NO. 200

IN THE

UNITED STATES SUPREME COURT

October Term, 1921.

HENRY E. STEVENS, Jr.,
Petitioner,

vs.

ARTHUR S. ARNOLD, ABRAM L. ERLANGER and REAL ESTATE TITLE INSURANCE AND TRUST COMPANY OF PHILADELPHIA, Executors and Trustees under the Will of SAMUEL F. NIRDLINGER, Deceased,
Respondents.

PETITION FOR WRIT OF CERTIORARI

to Review Decree of the Circuit Court of Appeals Affirming Decree of the United States District Court for the District of New Jersey

together with

MOTION AND NOTICE AND APPEARANCE.

HARVEY F. CARR,
Attorney for and of Counsel with Henry E. Stevens, Jr., Petitioner.

J. F. Huntzinger Co., Appellate Printers, Camden, N. J.

SUPREME COURT OF THE UNITED STATES.

HENRY E. STEVENS, JR.,
Petitioner,
vs.
ARTHUR S. ARNOLD, ABRAM L. ERLANGER and REAL ESTATE TITLE INSURANCE AND TRUST COMPANY OF PHILADELPHIA, Executors and Trustees under the Will of SAMUEL F. NIRDLINGER, deceased,
Respondents.

Petition for Writ of Certiorari to Review Decree of the Circuit Court of Appeals Affirming Decree of the United States District Court for the District of of New Jersey.

To the Honorable the Supreme Court of the United States:

The petition of Henry E. Stevens, Jr., respectfully shows to this Honorable Court that:

On the twenty-sixth day of October, nineteen hundred and fourteen, Samuel F. Nirdlinger, a resident and citizen of the City of Philadelphia and State of Pennsylvania, filed his bill of complaint against Henry E. Stevens, Jr., a resident and citizen of the City, County and State of New York, in the United States District Court for the District of New Jersey. The bill was filed by the complainant to quiet title to certain lands along the Atlantic Ocean at Atlantic City, New Jersey, and was based primarily on the New Jersey statute entitled, "An Act to com-

pel the determination of claims to real estate in certain cases and to quiet title to the same." 4 N. J. C. S. 5399. The *locus in quo* borders on the high water mark of the Atlantic Ocean, and has been formed by accretions or alluvion, and has a value in excess of one hundred thousand dollars.

To this bill your petitioner filed an answer setting up the defense of *res judicata* as well as a claim under a riparian grant from the State of New Jersey, and also by accretions. The defense of *res judicata* was based upon a bill filed in the New Jersey Court of Chancery on October second, nineteen hundred and nine, against the same defendant, and praying for the same relief in respect to the same property, which proceedings were set forth at length in the answer.

The original bill in the New Jersey Chancery proceedings claimed the *locus in quo* by reason of accretions "in front of said tract of land by alluvial deposits." An amended bill was filed in the New Jersey Court of Chancery in which the claim based upon accretions was abandoned and a claim based upon deeds executed by former owners was substituted. At the final hearing in the New Jersey Court of Chancery this amendment was made, and the defendant in that suit (Stevens) applied for and was granted permission to answer the amended bill, and also to include in the defendant's claim of title based upon a riparian grant, a claim by accretions. In the New Jersey Chancery suit the defendant there (Stevens) claimed under a riparian grant from the State of New Jersey as well as by accretions.

After a hearing on the merits in the New Jersey Court of Chancery an order was entered dismissing the bill of complaint, which order, so far as the same is relevant, reads as follows:

"And it appearing to the satisfaction of the Court that the complainants are not entitled to any relief whatsoever by reason of the matters and things in their bill of complaint and set forth, and that said bill ought to be dismissed with costs:

"It is thereupon, etc., ordered that the complainants' bill of complaint be and the same is hereby dismissed with costs."

From this final order or decree an appeal was taken to the New Jersey Court of Errors and Appeals, which latter court after a hearing on the merits entered a decree of affirmance, and remitted the record to the Court of Chancery. Subsequently the bill in this case was filed, and in the answer the defense of *res judicata* was set up in bar of the action, as well as the defense on the merits based upon the riparian grant from the State of New Jersey, and the claim by accretions.

The prayer in the original bill filed in the New Jersey Court of Chancery, so far as it is here relevant, reads as follows:

"To the end, therefore, that the defendants may, in manner aforesaid, answer and set forth specifically what title or claim to said lands, or any part thereof, or any interest therein, they or either of them make or claim, and to what part, or what interest; and further how, and by what instrument such title is claimed or derived or was created; and that by the determination and final decree of this court, the rights of all the parties to this suit in and to the lands hereinbefore set forth, and every part thereof, may be fixed and settled; and that your orators may be decreed to have a perfect title thereto, and the defen-

dants to have no estate, interest in, or encumbrance on, said lands, or any part thereof; and that their claims to the same are unjust, vexatious and void."

The prayer in the amended bill is identical with that of the original bill.

The prayer in the bill *sub judice* is identical in substance with the prayer of the other two bills, except that there is added thereto the following:

"And that the cloud upon the title of your orator to said lands and premises created and occasioned by the alleged riparian grant hereinabove referred to, and the deed of conveyance from William H. Bartlett and Elwood S. Bartlett and wife to the defendant hereinabove referred to may be, so far as said lands and premises are concerned, declared and decreed to be null and void, and of no effect as against your orator, and that your orator's right in and title to said lands and premises may be decreed to be relieved from the lien or cloud occasioned by the said alleged riparian grant and deed of conveyance, and that the said defendant, Henry E. Stevens, Jr., may be likewise decreed to have no title or interest in or to said lands and premises by reason of said alleged riparian grant and deed."

The additional matter at best is but surplus verbiage. Without the added matter the plaintiff prayed that he might be decreed to have a perfect title and the defendant to have no estate, interest in, or encumbrance upon the said lands, etc. No additional force is given to the prayer which asks that the defendant be decreed "to have no estate, interest in,

or encumbrance upon the said lands and premises by reason of said alleged riparian grant and deed." It is axiomatic that the greater includes the less.

Upon final hearing the United States District Court for the District of New Jersey entered its final decree on the twenty-fifth day of March, nineteen hundred and twenty, wherein it was adjudged that the final decree in the New Jersey Court of Chancery, affirmed by the Court of Errors and Appeals of the State of New Jersey, and the matters and things therein decided, "are not *res adjudicata* of the issues herein contained, and constitute no bar to the plaintiffs prosecuting this suit."

It was further therein adjudged and decreed that the defendant Stevens "has no right, title or interest in or encumbrance upon the said lands and premises in dispute in this action," describing said lands by metes and bounds.

And it was therein further adjudged and decreed that "the cloud cast upon plaintiffs' lands by the riparian grant made by the State of New Jersey * * * is decreed to be null and void and of no effect, and that the lands and premises hereinabove last described are hereby decreed to be relieved of and clear from the lien or cloud occasioned by said riparian grant and by the said deed from the State's grantees to William H. Bartlett and Elwood S. Bartlett, defendant's predecessors in title."

From the last mentioned decree an appeal was taken to the United States Circuit Court of Appeals for the Third Circuit, which said court on the second day of August, nineteen hundred and twenty-one, entered an order affirming said decree, and issued its mandate thereon to the United States District Court for the District of New Jersey on the second day of September, nineteen hundred and twenty-one.

A certified copy of the entire record of said case in said Circuit Court of Appeals is hereby furnished, attached to and made a part of this application, and marked Exhibit A, in compliance with Rule 37 of this Honorable Court.

Your petitioner is advised and believes that the said judgment of the United States Circuit Court of Appeals in this case is erroneous, and that this Honorable Court should require said case to be certified to it for review and determination in conformity with the provision in Section 240, Judicial Code, said case being made final in said Circuit Court of Appeals by the provision in Section 128, Judicial Code.

The said case was decided in the said Circuit Court of Appeals and affirmed upon the opinion of the United States District Court for the District of New Jersey, and should be reversed for the following reasons:

1. Because the suit in the New Jersey Court of Chancery was identical as to parties, property and the relief sought. Expressed in the language of Judge Haight in the United States District Court (Record, p. 318):

> "Sometime prior to the institution of this suit the present plaintiff and a corporation known as the Dewey Land Company, being at that time tenants in common of the land in question, brought a suit in the Court of Chancery of New Jersey under the *same* statute against the *same* defendant and therein sought the *same* relief in respect to substantially the *same* property as is sought in the present suit, except that the prayer for relief in the bill in the former suit did not, as does the bill in the present suit,

specifically pray for the removal of the alleged cloud upon the title."

The "alleged cloud" being the same claim under the riparian deed set up by the defendant in the New Jersey Chancery suit. This portion of the prayer relating to the "cloud on the title" appears above in this petition.

Under the New Jersey statute it is only incumbent upon the complainant in a suit to quiet title to set up the jurisdictional facts of peaceable possession, a hostile claim, and the fact that no suit is pending to enforce such claim. These facts being established the Court has jurisdiction to determine the controversy, and the defendant is required to assert, set forth and establish his title or claim. Upon the establishment of the jurisdictional grounds the position of the defendant in the suit is shifted so that he becomes in effect a plaintiff in an ejectment suit. *Fittichauer vs. Met. Fireproofing Co.*, 70 N. J. Eq. 429, 431. In other words, if the defendant makes no proofs the complainant succeeds by virtue of his possessory title.

A title by possession is better than no title, so that in order for a defendant to defeat the complainant in such a suit he must show and prove a title superior to the complainant's title by possession, hence any adjudication or determination of the Court that the complainant is not entitled to relief carries with it as a necessary corollary the fact that the defendant has asserted and proved a title superior to that exhibited and proved by the complainant in such a suit.

2. The doctrine of *res adjudicata* applies not only to the claim or demand in controversy, concluding

the parties and those in privity with them, as to any matter which was offered and received to sustain or defeat the claim or demand, but as well, to any other admissible matter which might have been offered for that purpose. See *Cromwell vs. County of Sac*, 94 U. S. 351.

It is obvious that in the Chancery suit not only was opportunity afforded to the complainant to base his claim upon accretions, but such claim was actually made by him and abandoned. He is, therefore, concluded in that suit as well as in this as to such claim.

To summarize the reasons why the New Jersey suit was *res adjudicata* and the decree therein a bar to this action, your petitioner submits the following:

a. That the suits are identical in character, parties and privies, and in the prayers for relief.

b. That every title, right or claim asserted by the plaintiff in this suit were equally available to him in the New Jersey suit.

c. That the New Jersey suit was determined upon the merits and the opposing claims of the plaintiff and defendant were considered and there adjudicated, and the defendant Stevens' title was adjudged to be superior to that of the plaintiff Nirdlinger.

d. That the plaintiff Nirdlinger was bound in the New Jersey suit not only as to any matter which was offered and received to sustain his claim, or to defeat the claim or demand of Stevens, but as to any other admissible matter which might have been offered for that purpose. That among such admissible matters was the claim for accretions, which was ac-

tually advanced in the original bill of complaint and later voluntarily abandoned by the complainant therein.

e. That the dismissal of the complainant's bill in the New Jersey suit was not the equivalent of a non-suit, but was a dismissal after a hearing upon the meirts, and that such dismissal constituted an adjudication adverse to every claim the complainant made or might lawfully have made in that suit.

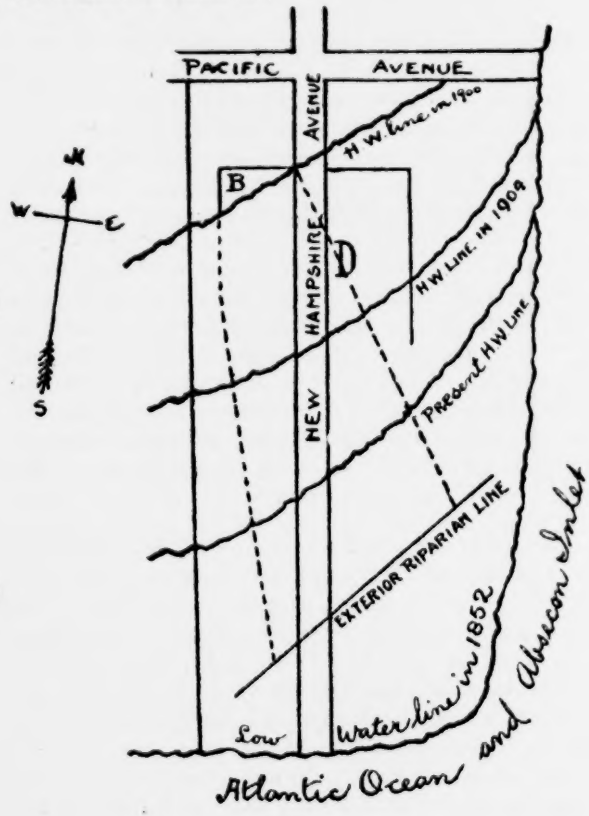
f. Even though the decree of the New Jersey Court of Chancery or the Court of Errors and Appeals might have been more specific in form, yet in substance it is an adjudication that the title asserted by the defendant Stevens therein was superior to the title of the complainant Nirdlinger, and is a sufficient compliance with the New Jersey statute.

g. In any event neither the United States District Court nor the Circuit Court of Appeals is sitting in review of the decree of the New Jersey Court of Errors and Appeals. The function of the District Court and the Circuit Court of Appeals is limited to determining whether or not there was an adjudication on the merits. If so, such adjudication must stand and cannot be corrected or amended in this suit.

3. The riparian grant by the State was superior to the complainant's title by accretions. This is established by two opinions of the New Jersey Court of Errors and Appeals in *Dewey Land Co. vs. Stevens*, 83 N. J. Eq. 314, and 83 N. J. Eq. 656. Even if it should be held that the above case was not *res adjudicata*, certainly the rule of *stare decisis* would apply as representing the latest pronouncement of the court of last resort in New Jersey in construing the riparian grant in this very case, and even though

in conflict with the earlier cases must be regarded as the law of the State of New Jersey.

4. The Court erred in holding that the respondents' rights by accretion were superior to those of the appellant. The *locus in quo* is a triangular piece of land lying east of New Hampshire Avenue, which is shown by a sketch in the opinion of Judge White, which sketch is reproduced for the convenience of the Court as follows:



All of the lands in question lie to the eastward of New Hampshire Avenue and New Hampshire Avenue extended to the riparian line established by the State of New Jersey, and have been formed by accretions. For a convenient summarized statement of the physical conditions your petitioner quotes from the opinion of Judge White, of the New Jersey Court of Errors and Appeals, in *Dewey Land Co. vs. Stevens,* 83 N. J. Eq. 656. It is to be observed that the shore line at this point and vicinity is convex, and that in order to completely divide all of the accreted territory such divisions must be by radial lines, and that the mere protraction of the side lines would result in an inequitable apportionment, in that all the gain in the shore line would go to the most easterly proprietor instead of being equitably divided. This method is pointed out by Judge White in *Dewey Land Co. vs. Stevens, supra,* as follows:

> "But, however that might be, and returning to the question of whether there is involved in this case a conflict between the accretion rights of an owner of the shore and rights under a State riparian grant to an independent grantee of land in front of such shore, no one pretends that in the present case the riparian grant by the State to the defendants' predecessor in title, Bartlett, was intended as or was a grant of any land under water not in front of and adjacent to the grantee's high land at the time the grant was made. It was expressly made to depend upon his ownership of such high land. In other words, it was expressly confined in its limits to the area which in case of natural accretions would become a part of such high land by virtue of the law of accretions according to the loca-

tion of the high water line *as it existed at the time of the grant. Gould Wat. Sec.* 163; *Clark vs. Campau,* 19 Mich. 327; *Stone vs. Boston Steel and Iron Co.,* 96 Mass. 230. Of course, changes are constantly taking place in the high water lines and in the direction thereof. A shore which one year was concave in its contour may a year later have become convex. The resultant effect upon lines projected at right angles to it at various points during the process of transition to determine boundaries between neighboring accretion gains, is hopelessly confusing and the consequent state of uncertainty in titles most injurious. A practical working system is necessary for the good of all, and where such a system has been established its fairness must be more than questioned, in fact, must be clearly overthrown, before the courts will feel justified in intervening. Such a working system seems to have been adopted by the riparian commission under its appointment by, and within the discretion vested in it, by the sovereign power of the State. Under this working system it takes the line of general contour of the shore in the vicinity, and, disregarding local or trivial or temporary indentations or excrescences, runs its division lines at right angles, or as nearly at right angles as is equitable under the circumstances, to such general line of contour *at the time it takes up the subject of making riparian grants in such vicinity,* and, then subsequently, adheres as nearly as possible, or as is equitable, to the general division lines thus established, without regard to the fact that subsequent shifting of angles and locations of the high water line may have brought about

a condition, which, if it had existed originally, would have produced different results in the directions of such division lines. Not only do I fail to see any unfairness in this working system, but, on the contrary, I cannot see how any other could be practical. Where, therefore, as here, the riparian commission has made a grant, the bounding division or side lines of which run at right angles, if that is equitable, or if not, at such angle as, under the circumstances, is equitable, to the general contour of the shore at the time of the plotting or surveying of the vicinity for riparian granting, such lines will, I think, be upheld by the courts as a *practical and legal ascertainment* of the boundary lines of subsequent accretion gains to the adjacent high land should such gains occur. *Gould Wat. Secs.* 162, 163. This is so, I take it, not because the State, through the riparian grant, has vested in its grantee a title to land under water which survives when the land *by accretions to the adjacent high land* has ceased to be under water, but because the riparian grant, as here made, is by its very authority confined to the land under water in front of the grantee's adjacent high land, viz., to the land which would become his by accretion to such high land should natural accretions occur, and, consequently, the division boundary lines defined in the grant are an authoritative ascertainment by the granting tribunal of the boundary lines of those accretion gains should they occur. *Gould Wat. Sec.* 162."

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court directed to the

United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and to send to this court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in said case entitled Arthur S. Arnold, Abram L. Erlanger and Real Estate Title Insurance and Trust Company of Philadelphia, executors and trustees under the will of Samuel F. Nirdlinger, deceased, respondents, vs. Henry E. Stevens, Jr., appellant, No. 2642, to the end that the said case may be reviewed and determined by this court, as provided by Sec. 240, Judicial Code; or that your petitioner may have such other or further relief or remedy in the premises as this court may deem appropriate and in conformity with said provision of the Judicial Code, and that said judgment of the said Circuit Court of Appeals in said case and every part thereof may be reversed by this Honorable Court.

HENRY E. STEVENS, JR.,
Petitioner.

HARVEY F. CARR,
Solicitor.

STATE OF NEW JERSEY, }
COUNTY OF CAMDEN, } *ss.*

HARVEY F. CARR, being duly sworn according to law, on his oath says, that he is the solicitor of the petitioner named in the foregoing petition and the agent of the said petitioner in this behalf, and that deponent has had actual charge of the preparation and trial of the suits and appeals described in the foregoing petition, and that the statements of fact contained in said petition are true.

HARVEY F. CARR.

Sworn to and subscribed before me this 15th day of October, A. D. 1921.

THOMAS B. KENWORTHY,
(Seal) *Notary Public of N. J.*
Commission expires June 6th, 1924.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for a writ of certiorari is, in the judgment of counsel, well founded, and is not interposed for delay.
Dated, Camden, N. J.,
October 15, 1921.

HARVEY F. CARR,
Attorney for and of Counsel with Petitioner.

Now comes Henry E. Stevens, Jr., by his attorney in his behalf, and moves this Honorable Court that it shall by certiorari or other proper process, directed to the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit, require said Court to certify to this Court, for its review and determination, a certain cause in said Circuit Court of Appeals lately pending, herein your petitioner was the party appellant, the complete title of the cause being, Arthur S. Arnold, Abram L. Erlanger and Real Estate Title Insurance and Trust Company of Philadelphia, executors and trustees under the will of Samuel F. Nirdlinger, deceased, respondents, vs. Henry E. Stevens, Jr., appellant. That this motion may be granted your petitioner respectfully offers herewith his petition and brief in support thereof, also a certified copy of transcript of record of all proceedings in the United States Circuit Court of Appeals for the Third Circuit. All original documents are offered with the required number of copies.

Dated, Camden, N. J.,
October 25, 1921.

HARVEY F. CARR,
Attorney for and of Counsel with Petitioner.

To the Respondents in the Above-entitled Matter:

Please take notice that on Monday, the 28th day of November, 1921, at the opening of the court on that day, or as soon thereafter as counsel may be heard, Henry E. Stevens, Jr., petitioner herein, will upon his petition and copies of the entire record of this action, submit a motion, a copy of which and of the petition for a writ of certiorari and brief in support thereof, are herewith delivered to you, to the Supreme Court of the United States, in its court room at the Capitol, in the City of Washington, District of Columbia.

Dated, Camden, N. J.,
October 25, 1921.

HARVEY F. CARR,
Attorney for and of Counsel with Petitioner.

Appearance

Henry E. Stevens, Jr.,
Petitioner,

vs.

Arthur S. Arnold, Abram L. Erlanger and Real Estate Title Insurance and Trust Company of Philadelphia, Executors and Trustees under the will of Samuel F. Nirdlinger, deceased,
Respondents.

The clerk will enter my appearance as counsel for the petitioner.

(Name) HARVEY F. CARR,
(P. O. Address) 4th & Market Sts.,
Camden, N. J.

No. 5[redacted]200

IN THE

UNITED STATES SUPREME COURT

October Term, 1921.

HENRY E. STEVENS, JR.,
Petitioner,

v.

ARTHUR S. ARNOLD, ABRAM L. ERLANGER, and REAL ESTATE TITLE INSURANCE AND TRUST COMPANY OF PHILADELPHIA, Executors, &c.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

---

BRIEF FOR HENRY E. STEVENS, JR., PETITIONER

HARVEY F. CARR,
Attorney for and of Counsel with Petitioner.

Petition for Certiorari filed October 28, 1921.
Certiorari Return filed January 28, 1922.
(28,553)

I. F. Huntzinger Co., Appellate Printers, Camden, N. J.

No. 598.

IN THE

UNITED STATES SUPREME COURT

October Term, 1921.

HENRY E. STEVENS, JR.,
Petitioner,

v.

ARTHUR S. ARNOLD, ABRAM L. ERLANGER, and REAL ESTATE TITLE INSURANCE AND TRUST COMPANY OF PHILADELPHIA, Executors, &c.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

---

INDEX

SUPREME COURT OF THE UNITED STATES

HENRY E. STEVENS, JR.,
Petitioner,
v.
ARTHUR S. ARNOLD, ABRAM L. ERLANGER and REAL ESTATE TITLE INSURANCE AND TRUST COMPANY OF PHILADELPHIA, Executors and Trustees under the Will of SAMUEL F. NIRDLINGER, deceased,
Respondents.

On Writ of Certiorari to Review Decree of Circuit Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONER.

SUMMARIZED STATEMENT OF FACT.

This writ of certiorari reviews the record and final decree of the Circuit Court of Appeals for the Third Circuit affirming a decree of the United States District Court for the District of New Jersey overruling the defense of *Res Judicata* set up by Stevens, the petitioner, and also adjudging the petitioner to have no right, title or interest, &c., in and to certain lands and premises in dispute in this action.

For convenience the designation "appellant" is used throughout this brief to designate the "petitioner" in this court, in order that the designation of the parties in the Circuit Court of Appeals may be preserved without change.

The bill was filed by the respondent to quiet title to certain lands along the Atlantic Ocean at Atlantic City, New Jersey, and was based primarily on the New Jersey Statute entitled, "An Act to compel the determination of claims to real estate in certain cases, and to quiet title to the same." 4 N. J. Comp. Stat. 5399. Appendix, p. .

The *locus in quo* borders on the high water mark of the Atlantic Ocean, and has been formed by accretions or alluvion, and is illustrated by the shaded triangle bounded on the west by the easterly line of New Hampshire Avenue, as appears by a blue print map marked Exhibit D8, Appendix, facing p. 3a, in this cause, and attached to this brief. The disputed territory forms a part of a riparian grant made by the State of New Jersey to W. H. and E. S. Bartlett, dated June 2, 1900, and appearing upon the same blue print. At the time of the grant, the Bartletts, who were Stevens' predecessors in the title, were the owners of a lot of land beginning at a point 250 feet south of Pacific Avenue and lying immediately to the southward of lot marked "Jonah Wooten, 1854."

Both appellant and respondent claim by mesne conveyances through Atlantic Beach Front Improvement Company, which derived its title from John McClees, by deed dated March 9, 1897. The Atlantic Beach Front Improvement Company conveyed November 9, 1899, to William H. Burkhard. Burkhard and wife conveyed to William H. Bartlett and Elwood S. Bartlett November 29, 1899. While the Barletts were the owners a riparian grant was made

by the State of New Jersey to William H. Bartlett and Elwood S. Bartlett, April 30, 1900. The Bartletts conveyed the upland, together with lands covered by the riparian grant, to Stevens, by deed dated April 25, 1905. Record, pages 49 and 50.

The respondents acquired title in two parcels.

First: By deed from Atlantic Beach Front Improvement Company to States Avenue Land Company, by deed dated May 24, 1900, and by mesne conveyances the title thereto vested in the respondents. This land immediately adjoins Stevens' land on the east and is described as follows: Being a strip beginning at the southeast corner of Dewey Place and New Hampshire Avenue, 90 feet along the south line of Dewey Place 160 feet more or less to the high water mark of the Atlantic Ocean. Record, p. 35.

Second: By deed from Atlantic Beach Front Improvement Company to Henderson, Moss and Hancock, dated November 1, 1899, and by mesne conveyances title vested in the respondents. This parcel begins in the south line of Dewey Place, 90 feet east of New Hampshire Avenue, and extends thence east along Dewey Place 100 feet by south 350 feet more or less to the high water mark of the Atlantic Ocean, and immediately adjoins respondents' first parcel on the eastward, the two together making the lands described in the complainant's bill, having a frontage of 190 feet on Dewey Place, and extending southward to the high water line of the Atlantic Ocean as it then existed.

Since 1900 about 600 or 700 feet of land measured along New Hampshire Avenue has been added by accretions. In 1900 the line of high water was approximately convex in curvature. The present high

water line is of the same general character; in fact, all high water lines, as well as the exterior riparian line, are convex. See blue print, Exhibit D8 annexed, Appendix, facing p. 3a.

The final decree in this cause adjudged as follows:

1. That the matters and things decided in the suit in the New Jersey Court of Chancery "are not *res adjudicata* of the issues herein contained, and constitute no bar to the plaintiffs prosecuting this suit.

2. "That defendant (Stevens) has no right, title or interest in or encumbrance upon the said lands and premises in dispute in this action."

3. "That the cloud cast upon plaintiffs' lands by the riparian grant made by the State of New Jersey * * *, so far as the same overlaps the lands hereinabove last described (the *locus in quo*), is decreed to be null and of no effect, and that the lands and premises hereinabove last described (the *locus in quo*) are hereby decreed to be relieved of and clear from the lien or cloud occasioned by said riparian grant and by said deed from the State's grantees to William H. Bartlett and Elwood S. Bartlett, defendant's predecessors in title."

The following questions are thus presented:

I. Were the proceedings in the New Jersey Court of Chancery res judicata of the issues in this case?

II. If not, is the riparian grant to the appellant's predecessor in the title superior to and exclusive of the respondents' title by accretions?

III. Is the appellant's title by accretions to the locus in quo superior to the respondents' title by accretions? This involves the question as to whether the equitable method of division of a segment is by radial lines at practically right angles to the shore line, or by the protraction of the upland side lines.

IV. Whether by reason of certain conveyances of upland having been made with reference to New Hampshire Avenue, thereby that avenue was constituted a fixed boundary and impassable barrier separating as between co-terminous owners of the upland the accreted lands thereafter formed.

A bill was filed in the New Jersey Court of Chancery on October 2, 1909, against the *same* defendant and praying for the *same* relief in respect to the *same* property. The original bill claimed the *locus in quo* by reason of accretions "in front of said tract of land by alluvial deposits." Record, p. 16. An amended bill was filed in which the claim by accretions was abandoned, and a claim based upon deeds executed by John McClees and the heirs of Robert B. Leeds (a former owner) was substituted. Record, p. 20. At the final hearing in the Court of Chancery this amendment was made, and the defendant in that suit (Stevens) applied and was granted permission to answer the amended bill and also to include in the defendant's claim of title based upon a riparian grant, a claim by accretions (See State of the Case, *Dewey Land Co. v. Stevens,* p. 24. Appendix annexed, p. 4a.) In the Chancery suit the defendant there (Stevens) claimed under a riparian grant from the State of New Jersey as well as by accretions. After a hearing on the merits in the Court of Chancery an order was entered dismis-

sing the bill of complaint, which order, so far as material, reads as follows:

> "And it appearing to the satisfaction of the Court that the complainants are not entitled to any relief whatsoever by reason of the matters and things in their bill of complaint contained and set forth, and that said bill ought to be dismissed with costs:
>
> "It is, thereupon, &c., ordered that the complainants' bill of complaint be and the same is hereby dismissed with costs." Exhibit E, Record, p. 30.

It is to be noted that in the original bill in the Court of Chancery the complainant there set up the fact of peaceable possession (Exhibit A, p. 17), and made the same claim in the amended bill (Exhibit B, p. 20). This fact was not denied, and, therefore, conceded, and thereupon the Court was invested with full jurisdiction to try the issue.

Vice-Chancellor Walker in his opinion in *Dewey Land Co. v. Stevens* (Exhibit D1, p. 110, Record Circuit Court of Appeals and for convenience printed in Appendix at p. 6a), finds that "the jurisdictional facts of peaceable possession in the complainant and no suit pending are present."

From this final order or decree an appeal was taken to the New Jersey Court of Errors and Appeals, which latter court, after a hearing on the merits, entered a decree of affirmance and remitted the record to the Court of Chancery.

Subsequently the bill in the case *sub judice* was filed, and in the answer the defense of **Res Judicata** was set up in bar, as well as a defense on the merits based upon the **Riparian Grant** from the State of New Jersey and the claim by **Accretions**.

I.

RES ADJUDICATA.

1. The suits are identical in character, parties, privies, and in the prayers for relief.

2. Every title, right or claim asserted by the respondent were equally available to him in the New Jersey suit.

3. Possession of the complainant in the New Jersey suit (respondent) having been admitted, the appellant (defendant in the Chancery suit) became in effect the plaintiff in ejectment. Had the appellant shown no title the plaintiff in the Chancery suit would have won on his possessory title, and would have been entitled to an affirmative decree, and his bill could not properly have been dismissed.

4. The New Jersey suit was determined upon the merits, and the opposing claims of the parties were considered and there adjudicated. These opposing claims were as follows:

NIRDLINGER:	STEVENS:
(a) Possession	(a) Riparian grant.
(b) A paper title from the Leeds heirs.	(b) Accretions.

A finding in favor of Stevens is a finding that the title offered by Stevens was superior to that offered by Nirdlinger. If Stevens had no title whatever (as found by Judge Haight) then Nirdlinger was entitled to succeed by virtue of his possession alone. In such a situation, Nirdlinger showing possession, and Stevens showing no title, Nirdlinger

would have been entitled to an affirmative decree in his favor, and Stevens would not have been entitled to a dismissal of the bill.

5. Nirdlinger was bound in the New Jersey suit, not only as to any matter which was offered and received to sustain his claim, or to defeat the claim or demand of Stevens, but as to any other admissible matter which might have been offered for that purpose, among which was the claim for accretions which was actually advanced in the original bill and voluntarily abandoned by the complainant therein.

6. The dismissal of the bill in the New Jersey court was not the equivalent of a non-suit, but was a dismissal after a hearing upon the merits, and such dismissal constitutes an adjudication adverse to every claim the plaintiff made or might lawfully have made in this suit.

7. Even though the decree of the New Jersey Court of Chancery, affirmed by the Court of Errors and Appeals might have been more specific in form, yet, in substance, it is an adjudication that the title asserted by Stevens was superior to that of Nirdlinger, and is sufficient compliance with the New Jersey Statute.

In any event this Court is not sitting in review of the decree of the New Jersey Court of Chancery as affirmed by the Court of Errors and Appeals, and its function is limited to determining whether or not there was an adjudication on the merits. If so, such adjudication must stand and cannot be corrected, amended or revised in this suit.

I. RES JUDICATA.

To correctly understand the problem involved it is necessary to consider the nature of a suit to quiet title under the New Jersey statute (4 N. J. C. S. 5399). Under the statute it is only incumbent upon the complainant in such a suit to set up the jurisdictional facts of peaceable possession, a hostile claim, and the fact that no suit is pending to enforce such claim. These facts being established the Court has jurisdiction to determine the controversy and the defendant is required to assert, set forth, and establish his title or claim. *Failing to do all of these things it is adjudged that he has no title or claim.*

Upon the establishment of the jurisdictional grounds the position of the defendant in the suit is shifted so that he becomes in effect a plaintiff in an ejectment suit. *Fittichauer v. Metropolitan Fireproofing Co.*, 70 N. J. Eq. 429, 431. In other words, *if the defendant makes no proofs of a title superior to the complainant's title by possession the complainant succeeds by virtue of his possessory title.*

Obviously a title by possession is better than no title, so that in order for a defendant to defeat the complainant in such a suit he must show and prove a title superior to the complainant's title by possession. Hence any adjudication or determination of the Court that the complainant is not entitled to relief carries with it as a necessary corollary the fact that the defendant has asserted and proved a title superior to that exhibited and proved by the complainant in such a suit.

Of course, the doctrine of *res judicata* applies not only to the claim or demand in controversy concluding the parties and those in privity with them, not

only as to any matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. See *Cromwell v. County of Sac.*, 94 U. S. 351.

It is perfectly obvious that in the Chancery suit not only was opportunity afforded to the complainant to base his claim upon accretions, but such claim was actually made by him and abandoned. He is, therefore, concluded in that suit, as well as in this, as to such claim.

Judge Haight dismisses this by a gesture and waives it aside by the single sentence: "But this is a *non sequitur.*" But is it? Bearing in mind that if the defendant establishes no claim superior to that of the complainant's title by possession the defendant is defeated in the action, is it not inevitable that the Court of Errors and Appeals was compelled to balance the defendant's title as against the complainant's? And did this not necessarily involve a determination that the title asserted by the defendant under its riparian deed was superior to the complainant's title by possession? Did it not, so far as the law of the case is concerned, necessarily involve a determination as to the validity of the defendant's title under the riparian grant? If the riparian grant conferred no title upon the defendant, then the complainant was entitled to a decree of reversal adjudging that the defendant was entitled to no interest in the land.

The learned trial Judge then indulges in the following conjectures:

> "It may be that the decision has established a new jurisdictional requirement, viz: That the plaintiff must establish some kind of title to the land in controversy before the defendant is required to set forth and establish his claim,

and in the event of his failure so to do the Court is not at liberty to entertain a bill filed under the statute in question."

The nature of the statutory action is discussed with great clearness by Vice-Chancellor Stevenson in *Fittichauer v. Metropolitan Fireproofing Co., supra.* In that case the Court said:

"I think that great confusion has been made by this persistent effort of the complainant to state unnecessarily in his bill the claim which the defendant has made or is 'reputed' to have in respect of the land in question. If the complainant proves the jurisdictional facts the result is that the defendant is called upon affirmatively to set forth and maintain by proofs any adverse title or claim which he holds. The pleading of the defendant, if it sets forth a legal title, may be in effect a declaration in ejectment, and if it sets forth an equitable title, it may be in effect a bill in chancery. The complainant is under no obligation even to exhibit his own title until after the defendant has shown title. All that the complainant is obliged to show in the first instance is that he is in peaceable possession, and that no suit is pending in which the defendant's claim, whatever it may be, may be tested, and also, that he, the complainant, is unable to bring an action at law in which the test can be applied, *Jersey City v. Lembeck, supra,* and also, I think, that he, the complainant, is unable, except under the statute, to bring any suit in equity in which such test can be applied. *Van Houten v. Van Houten, supra.* When the complainant has shown these jurisdictional facts he awaits the presentation by a proper pleading of the defendant's claim or

title before making any disclosure of his own title."

"Complainant is under no obligation even to exhibit his own title until after the defendant has shown title" (70 N. J. Eq. at p. 43).

A. "Upon a bill to quiet title, when the jurisdictional facts are shown, * * * it is for the defendant to establish his claim."

Graves v. Fancher, 81 N. J. Eq. 517 (N. J. E. & A. 1913).

B. "Where, under a bill to quiet title (*Gen. Stat.* p. 3486), the complainant has established, to the satisfaction of the Court of Chancery, that he is in peaceable possession of the lands described in his bill of complaint claiming to own the same, and that his title is denied or disputed, and no suit is pending to test the validity of such hostile claim, the burden of establishing such adverse claim is upon the person setting it up, in which case the Court of Chancery may order that, in a feigned issue framed to test the validity of such claim, the defendant, or party setting it up, sustains the issue as plaintiff."

Ocean View Land Co. v. Loudenslager, 78 N. J. Eq. 571 (N. J. E. & A. 1911).

C. "The purpose of the act is to relieve, not persons who have the power to test the hostile claim by a direct proceeding in the usual mode, but to aid persons whose situation afford them no such opportunity. * * * It lends its aid to one in peaceable possession under claim of ownership *to compel an adverse claimant to establish his claim; he may do so in equity or at law, but*

in either case he is asserting a hostile claim against one in peaceable possession, which he must proceed to establish or abandon."

Ocean View Land Co. v. Loudenslager, 78 N. J. Eq. at p. 575 (N. J. E. & A.).

D. "Defendant assumes the burden of the affirmative on the issue of title, and carries the burden of establishing a title in conformity with the specification of title which the statute requires him to set forth in his answer."

Lambert v. Vare, 88 N. J. Eq. 81 (N. J. Chancery 1917).

E. "Title by possession must prevail unless plaintiff establishes evidence of superior right to the possession."

19 C. J. 1076.

F. "Defects in plaintiff's title constitute a good defense in an action against one in peaceable possession, although without color of title."

19 C. J. 1075.

G. "*Plaintiff who shows no title* cannot recover whether defendant's title is valid or not."

Stephens v. Moore, 116 Ala. 297; 22 S. 542; *Doe v. Clayton*, 81 Ala. 391; 2 S. 24.

H. "It is a universal rule in ejectment that the plaintiff can recover only on the strength of his own title, and not on the weakness of his adversary's."

19 C. J. 1039.

I. "The defendants have remained in possession of the premises, and the plaintiff can only re-

> cover against them upon the strength and validity of his own title, but the defendants can defend their possession by attacking the validity and legality of the sale and conveyance to the plaintiff."
>
> *Meyers v. Conover*, 65 N. J. L. 188 (N. J. Sup. Ct.).

This must be so, because until the defendant avers and proves a superior title the complainant would recover under his title by possession.

In view of the somewhat elaborate discussion of the rights of the defendant under his riparian grants from the state, two opinions having been filed in the cause, it is difficult to perceive why, if the Court desired to establish a new jurisdictional requirement in conflict with the statute and the adjudicated cases it would not have said so in plain and unmistakable language, and if this was its purpose the discussion of the rights of the defendant under the riparian grant appears to have been an idle waste of time on the part of an otherwise busy and industrious Court.

The second conjecture of the learned trial Judge is as follows:

> "On the other hand its action in merely affirming the dismissal of the bill may have been due to the fact that upon examining the record it found that the deeds relied upon by the complainants conferred no title upon them, and consequently it adopted *a practical and convenient* way of disposing of the case, and thus rendering it unnecessary for it to determine whether or not the defendant had any interest in the land, and hence it advisedly merely dismissed the bill; the complainants being treated rather as interlopers without a shadow of title."

It is difficult to understand why the second conjecture should be prefaced by "on the other hand." The conjecture in its nature is practically the same as the first conjecture, and entirely ignores the fact that no complainant who establishes possession, and against whom a higher title is not asserted and proved, is an "interloper," but on the contrary is entitled to a decree adjudging that his adversary has no right, claim or demand upon the *locus in quo.*

The cases cited in the opinion in support of the above and also previously cited by counsel for the respondents, all deal with questions where the appeal was dismissed for want of jurisdiction. These cases are: *Steelman v. Blackman,* 72 N. J. Eq. 330 and *Oberon Land Co. v. Dunn,* 60 N. J. Eq. 280. In the Blackman case an action of trespass at law was available and in the Dunn case, both parties had conveyed their interests prior to hearing and neither party had any rights in the land to be bound by the decree.

The Court of Chancery, in its opinion, found as a fact that "the jurisdictional facts of peaceable possession in the complainant and no suit pending, are present."

A "practical and convenient way of disposing of the case" would have been for the Court to have said: "The Court below was without jurisdiction to entertain this bill because certain jurisdictional facts (specifying them) are not established in this case." This course would have saved the Court much labor and research on the riparian grants involved. *It could not have said this, however, because all of the jurisdictional facts prescribed by the statute were established.*

It seems to us impossible to read the opinion of Justice Swayze and of Judge White in the New Jersey Court of Errors and Appeals and reach the con-

clusion that this case was not decided in that court on the ground that the defendant's riparian claim was superior to the complainant's claim. Indeed, the third syllabus in that case says:

> "HELD: That plaintiffs could not sustain their claim to the land under the grants to the former owners as *against the state's riparian grant.*"

(In New Jersey the syllabi are prepared by the Court.)

It appears in the opinion of Mr. Justice Swayze that the bill originally filed claimed title by accretion, and that this claim was abandoned, and by an amended bill the complainant set up title by deed from former owners.

The reason why the claim for accretion was not tried in the Chancery suit was because of its voluntary abandonment by the complainant therein. He had full and fair opportunity to litigate that question in the Chancery suit. He chose, however, to abandon it, but he is bound to the same extent as though he had actually litigated the case on the theory of accretions. He has no right to reopen litigation which is closed by the final decree of a court of last resort. He has no right to relitigate a controversy settled by the decree of the court of last resort in order to try the case upon a ground voluntarily abandoned by him in the first suit. Litigation would be unending if litigants are to be accorded a right to try the case repeatedly upon grounds that were available in the first suit.

In the opinion below the learned trial Judge said:

> "I accordingly conclude that the New Jersey decree is not *res adjudicata* of the questions in this case. If a contrary conclusion was reached there would be presented a situation where, al-

> though the title or interest of the defendant had never been settled, neither party would ever be able to procure a decree under the statute setting at rest the title to the land. Indeed the practical effect would be to confirm the defendant's claim of title to land of which the complainant was and is in peaceable possession, not because it had ever been so decreed by any court, but because in a previous suit the complainant had failed to established his title."

This seems to beg the question. If this Court is of the opinion that this case was tried on its merits in the Court of Chancery and the Court of Errors and Appeals of New Jersey, and that the determination of such case necessarily adjudged that the defendant's claim was superior to that of the complainant, then the matter is *res judicata,* be the inconvenience what it may. If the doctrine of *res judicata* is established it would not be a difficult matter for the appellant out of possession, whose rights had been adjudged to be superior to those of the person in possession, to obtain judicial relief in the proper forum and by the proper proceedings. It might be suggested that a suit in ejectment would be available as an effective means to accomplish the desired result.

> **In disposing of the defense of res judicata the sole question is: Did the New Jersey Court of Chancery and the Court of Errors and Appeals determine the case on the merits, and did it find that the defendant's title was superior?**

The plaintiff says the matter is not *res judicata* because—(a) The plaintiff's claim by accretions was not passed upon in the New Jersey suit. (b) Be-

cause the present suit is a *quia timet* suit for the purpose of removing a cloud upon the title, and under the general equity power of the Court as distinguished from a suit under the New Jersey statute.

Are these reasons sound? and do they differentiate this suit from the New Jersey suit? Is there anything in this suit that could not and should not have been tried in the New Jersey suit?

The purpose of an equity suit is best determined by an examination of the prayer for relief.

For convenient reference the prayers in the original and amended bills in the New Jersey Court of Chancery and in the bill in this cause are placed in parallel columns.

THE PRAYERS FOR RELIEF.

NEW JERSEY COURT OF CHANCERY.

ORIGINAL BILL.

"To the end, therefore, that the defendants may in manner aforesaid answer and set forth specifically what title or claim to said lands, or any part thereof, or any interest therein, they or either of them make or claim, and to what part or what interest; and further how, and by what instrument such title is claimed or derived or was created; and that by the determination and final decree of this court, the rights of all the parties to this suit in and to the lands hereinbefore set forth, and every part thereof, may be fixed, and settled, and that your orators may be decreed to have a perfect title thereto, and the defendants to have no estate, interest in, or encumbrance on said lands or any part thereof, and that their claims to the same are unjust, vexatious and void."

AMENDED BILL.

"To the end, therefore that the said defendants and either of them, may, but without oaths or affirmations, to the best of their respective knowledge, information and belief full, true, direct and perfect answer make to all and singular the matters aforesaid, and more particularly that they and either of them may in manner aforesaid answer and set forth specifically what title or claim to said lands or any part thereof, or any interest therein, they or either of them make or claim, and to what part and what interest; and further how, and by what instrument such title is claimed or derived or was created; and by the determination and final decree of this court, the rights of all the parties to this suit in and to the lands hereinbefore set forth, and every part thereof, may be fixed and settled; and that your orators may be decreed to have a per-

U. S. DISTRICT COURT

BILL OF COMPLAINT.

"To the end, therefore, that the said defendant, Henry E. Stevens, Jr., may, but without oath or affirmation, to the best of his knowledge, information and belief, full, true, direct, and perfect answer make to all and singular the matters aforesaid, and more particularly that he may in manner aforesaid answer and set forth specifically what title or claim to said lands, or any part thereof, or any interest therein, or encumbrance thereon, he makes or claims; and to what part and what interest; and further how and by what instrument such title is claimed or derived or was created; and by the determination and final decree of this court that the rights of all the parties to this suit in and to the lands hereinabove set forth, and every part thereof, may be fixed and settled, and that your orator may be decreed to have a perfect title thereto, and that

fect title thereto, and the defendants to have no estate, interest in or encumbrance on said lands or any part thereof; and that their claims to the same are unjust, vexatious and void.

the said defendants to have no estate, interest in or encumbrance upon the said lands, or any part thereof, and that his claims to the same are unjust, vexatious and void, *and that the cloud upon the title of your orator to said lands and premises created and occasioned by the alleged riparian grant hereinabove referred to, and the deed of conveyance from William H. Bartlett and Elwood S. Bartlett and wife to the defendant hereinabove referred to, may be, so far as said lands and premises are concerned, declared and decreed to be null and void, and of no effect as against your orator, and that your orator's right in and title to said lands and premises may be decreed to be relieved from the lien of the cloud occasioned by said alleged riparian grant and deed of conveyance, and that said defendant, Henry E. Stevens, Jr., may be likewise decreed to have no title or interest in or to said lands and premises by reason of said alleged riparian grant and deed.''*

THE ADDITIONAL MATTER APPEARS IN ITALICS AND AT BEST IS BUT SURPLUS VERBIAGE.

Without the added matter the plaintiff prayed that he might be decreed to have a perfect title and the defendant to have no estate, interest in, or encumbrance upon the said lands, etc. No additional force is given to the prayer which asks that the defendant be decreed "to have no estate, interest in, or encumbrance upon the said lands and premises by reason of said alleged riparian grant and deed." It is axiomatic that the greater includes the less. Indeed, Judge Haight, in his opinion, says:

> "Sometime prior to the institution of this suit the present plaintiff and a corporation known as the Dewey Land Company, being at that time tenants in common of the land in question, brought a suit in the Court of Chancery of New Jersey under the same statute against the *same* defendant and therein sought the *same* relief in respect to substantially the *same* property as is sought in the present suit, except that the prayer for relief in the bill in the former suit did not, as does the bill in the present suit, specifically pray for the removal of the before mentioned alleged cloud upon the title" ——

the "alleged cloud" being the claim under the riparian deeds set up by the defendant in the New Jersey suit.

The principal ground advanced by the plaintiff why the New Jersey decree was not *res judicata* is the following appearing upon the complainant's brief in the court below:

> "The issues in a bill to quiet title under the statute are determined by the defendant. The title that he asserts, whether one or more, constitutes the issue or issues in the cause. Under the statute *there is no opportunity for the complainant to alter or vary the issue,* to wit, the title claimed by the defendant, hence it is beside the question for defendant now to assert that complainant should have litigated some claim not litigated in that suit."

Is this assumption well founded? Bearing in mind that the statutory suit to quiet title is in effect a suit in ejectment, with the parties standing in the reverse order, and that the defendant is, therefore, the plaintiff in ejectment, can it seriously be contended that the issue is limited solely to the examination of the title presented by the defendant (plaintiff in ejectment), and that no opportunity is given to the opposite party to show a superior title? If the issue to be tried is: "Is the title or right of the defendant superior to that of the complainant?" then manifestly the Court must examine all of the claims of both of the parties to the suit. It is only upon the theory that the Court in a suit to quiet title does *not* try all of the claims between the parties, and does *not* permit the complainant to assert all of his claims that the complainant's contention would be entitled to any weight. That the complainant is not so restricted is self-evident.

The plaintiff is trying in this very cause, in the same form of action, and based upon the same statute, the identical issues which he tried in the New Jersey court. If the claim by accretions is available here why was it not available in the New Jersey suit? And if it is not available under the New Jersey statute how does it become available here?

In the trial Court the plaintiff in his brief advanced the following argument:

> "As we have already seen the complainant, in a bill under the statute to quiet titles, whose possession of the *locus in quo* is not questioned, is not compelled either to allege or prove the source of his title, or, indeed, that he has any title until and unless the defendant shows some interest or title in the lands. *Thereupon complainant is required to show that the said interest or title is not a valid interest or title to the lands. This he may do by showing an inherent defect in the claim or title asserted, or by showing that he has a superior title thereto.* Hence if, as in the New Jersey case and here, that possession is undisputed, the burden is at once cast upon the defendant to open and maintain his case affirmatively, and to establish the validity of his claim or title to the property in the complainant's possession."

This is a correct statement of the law, but is absolutely in conflict with the position taken by the plaintiff, in the brief submitted in the court below, to wit, that "under the statute there is no opportunity for complainant to alter or vary the issue, to wit, the title claimed by the defendant."

QUIA TIMET.

An attempt is made to escape from the doctrine of *res adjudicata* by giving the case a different aspect, by asserting "an independent claim under the general jurisdiction of the Court to have the cloud arising from the riparian grant removed," based upon general equitable principles of *quia timet.*

This is untenable. The statutory action is broader than the *quia timet* action, and every claim available under the latter is equally available under the former.

> "Statutes have been enacted in many states providing, in substance, that an action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an interest therein adverse to him, for the purpose of determining such adverse claim, estate, or interest, and to quiet title. These statutes operate on the old action to quiet title, which under the common law, *could not be maintained until the party in possession had been harrassed by repeated actions at law, and they gave an additional remedy in equity,* but since they gave it only to the party in possession, they have no effect on the rule that the aid of equity cannot be invoked where an adequate remedy at law exists."
>
> 32 Cyc. 1310.

The respondents in their brief in the Circuit Court of Appeals cite in support of the asserted difference between the statutory action and the *quia timet* action, the following cases:

(a) *Nixon v. Walter,* 41 N. J. Eq. 103;

(b) *Sheppard v. Nixon,* 43 N. J. Eq. 627;

(c) *American Dock & Improvement Co. v. Trustees for the Support of Public Schools,* 39 N. J. Eq. 409,

(a) merely held that the complainant out of possession, and who had brought his suit under the statutory action, could maintain the same as a suit *quia timet* irrespective of the statute. This case was reversed by the New Jersey Court of Errors in (b) *Sheppard v. Nixon, supra,* holding that the court

of equity had no jurisdiction, and that the remedy of the complainant in that case was by an action of ejectment at law. (c) *American Dock & Improvement Co. v. Trustees,* does not deal with the subject of *quia timet* in any way whatever, and, therefore, has no applicability.

In the New Jersey case possession, no action pending, and the existence of a hostile claim having been proven, in the language of the statute it became "lawful for such person so in possession to bring and maintain a suit in chancery to settle the title of said lands, and to clear up *all doubts and disputes concerning the same;* the bill of complaint in such suit shall describe the lands with certainty, and shall name the person who claims, or is claimed or reputed to have such title or interest in or encumbrance on said lands, and shall call upon such person to set forth and specify his title, claim or encumbrance, and how and by what instrument the same is derived or created." 4 N. J. Comp. Stat. 5399.

The Court of Chancery "shall * * * upon such inquiry and determination finally settle and adjudge whether the defendant has any estate, interest or right in, or encumbrance upon said lands, or any part thereof, and what such interest, estate, right or encumbrance is, and in or upon what part of said lands the same exists." 4 N. J. Comp. Stat. 5408.

The issue, therefore, to be tried is whether or not the title set up by the defendant is superior to the title of the complainant. This issue makes available every title, claim, lien or encumbrance of either party to defeat the other.

The rule was correctly set forth by the respondents in their brief submitted to the trial Court in the following language:

> "As we have already seen, the complainant, in a bill under the statute to quiet titles whose possession of the *locus in quo* is not questioned, is not compelled either to allege or prove the source of his title, or, indeed, that he has any title until and unless the defendant shows some interest or title in the lands. *Thereupon complainant is required to show that the said interest or title is not a valid interest or title to the lands. This he may do by showing an inherent defect in the claim or title asserted, by showing that he has a superior title thereto.* Hence if, as in the New Jersey case and here, that possession is undisputed, the burden is at once cast upon the defendant to open and maintain his case affirmatively, and to establish the validity of his claim or title to the property in the complainant's possession."

The above is a correct statement of the law, but absolutely in conflict with the position taken by the respondents in their brief in the Circuit Court of Appeals, to wit, that "under the statute there is no opportunity for complainant to alter or vary the issue, to wit, the title claimed by the defendant." It seems puerile to attempt to maintain that under a statute broader in its scope than the *quia timet* action a complainant is not permitted to assert a superior title to that set up by the defendant and thus defeat the action. The title to the act is, "An act to compel the determination of claims to real estate in certain cases and to quiet title to the same."

> "The jurisdiction conferred upon the Court of Chancery by the statute is merely an extension of its function to entertain bills *quia timet*

to remove clouds from the title of persons in possession of real property."

McAndrews & Forbes, v. City of Camden, 78 Atl. Rep. 232, 233 (N. J. Ct. of E. & A.).

The alleged "cloud upon the title" was the State's riparian grant, which was directly in issue in the New Jersey suit as well as in this suit. The plaintiff gains no additional rights by merely designating the adverse claim as a "cloud upon the title," for the reason that under the statutory action the defendant is required to set forth specifically what title or claim to said lands, or any part thereof, or any interest therein, the defendant makes or claims, and to what part or what interest; and further how and by what instrument such title is claimed or derived or was created; and the prayer is "that by the determination and final decree of this Court the rights of all the parties to this suit in and to the lands hereinbefore set forth, and every part thereof, may be fixed and settled, and that your orators may be decreed to have a perfect title thereto, and the defendants to have no interest in, or encumbrance on, said lands, or any part thereof; and that their claims to the same are unjust, vexatious and void."

Certainly the "cloud on the title" is embraced within the intendment of the statute and the broad prayer for relief in the bill of complaint.

Vice-Chancellor Walker in his opinion in *Dewey Land Co. v. Stevens,* Appendix, p. 6a, find that "The jurisdictional facts of peaceable possession in the complainant and no suit pending, are present." These were precisely the same jurisdictional facts that are found by Judge Haight in his opinion, at page 330, lines 32 and 33.

Some capital is attempted to be made out of the refusal of Vice-Chancellor Backes in an opinion reported in 85 N. J. Eq. 374, 96 Atl. Rep. 362, to amend the decree of the Court of Chancery by making the same more specific. This motion was denied, not on the merits of the application, but because the Vice-Chancellor conceived that the Court of Chancery was without power to amend a decree after the same had been affirmed by the Court of Errors and Appeals. He says in his opinion:

> "The motion, in effect, is to amend the decree of the Court of Appeals. Upon a simple affirmance on the merits, there is nothing further for the lower court to do in the case but to enter the mandate and enforce the judgment."

CONCLUSIVE EFFECT OF JUDGMENT ON THE MERITS.

A judgment if rendered upon the merits constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy concluding the parties and those in privity with them, *not only as to every matter that was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.*

The above doctrine is supported by *Cromwell v. The County of Sac*, 94 U. S. 351; *Paterson v. Baker*, 51 N. J. Eq. 49; *Clark Thread Co. v. Wm. Clark Co.*, 55 N. J. Eq. 658.

The plaintiff attempts to show from the cases above cited that this rule applies only in situations where the cause of action is the same, and that the cause of action in the case *sub judice* differs from the cause of action in the New Jersey suit, hence

that the rule is not applicable. It is elementary that if in the first suit no opportunity was available to present under the form of action a cause of action or defense, that the parties cannot be concluded by the earlier adjudication, because the effect of such a holding would be to deny such party any opportunity to be heard. If no opportunity existed in the first suit, and a defense was not available in the second, it is evident that the party never could be heard upon the merits. The answer is that the matter was not previously adjudicated; that there was no opportunity to adjudicate it, and that hence the matter could not be *res judicata.*

In *Cromwell v. The County of Sac,* it was held that there had been no previous opportunity to raise the question mooted in the second action, to wit, that the plaintiff therein was a *bona fide* holder for value of certain municipal bonds. In the case *sub judice* the plaintiff not only had the opportunity to base his claim upon accretions, but actually did so, and voluntarily abandoned such claim.

The case of *Paterson v. Baker,* 51 N. J. Eq. 49, supports the appellant Stevens' contention. In that case the plaintiff had issued 200 coupon bonds, certain of which had gone into the possession of John Petrie. Two of these were stolen from Petrie, and subsequently after public notice of the theft had been given, the complainant, after receiving a bond of indemnity paid Petrie the full value of the bonds. The stolen bonds came later into the possession of Baker, the defendant, who presented them for payment, and upon payment being refused brought suit against the complainant to recover the amount due on the coupons attached to the bonds. The defense that Baker was not the *bona fide* holder was upheld. Baker died leaving a will which made his wife executrix. The city then brought suit in Chancery against

the widow to have the bonds surrendered for cancellation, and it was held, upon the latter's attempt to show that she was a *bona fide* holder of the same; that this question had been finally determined and was *res judicata.*

Clark Thread Co. v. Wm. Clark Co., 55 N. J. Eq. 658. The opinion in that case reveals the fact that the complainant had previously brought suit in the United States District Court for an injunction against the use of a trade-mark and for accounting for profits realized by its use. The suit instead of being directed against the company using the trade-mark had been brought against the latter's manager who served the company on a salary. The Federal Court allowed an injunction but refused to consider the prayer for an accounting because no profits could be shown against the defendant. The second suit reported under the above title was against the company itself and prayed for an accounting. The Court held that though there was an identity of parties in the two suits (treating the principal and agent as one), the rule of *res judicata* would not apply in view of the fact that under the first suit it had been impossible to show profits.

> "It is entirely clear from the record in the preceding case and the testimony in this, that this was the reason why the decree in the former case was silent upon the question of accounting. It appeared in the evidence of the preceding case, without contradiction, and was stated in the brief of counsel for the defendant in that case, that Armitage was an employe of the William Clark Company upon a stated salary, beyond which he received nothing. All the profits received from sales made through his agency went to the present defendant. If the agent received no profits, it did not follow that the

principal received none. Therefore, the decree in the first case, based upon the fact that the agent had received no profits, could not conclude the complainant from an accounting against the principal for profits which it had received. The two decrees can stand together."

55 *N. J. Eq.* 667.

II.

THE RIPARIAN GRANT.

The riparian grant under which Stevens claims was made by the State of New Jersey through its riparian commission to William H. and Elwood S. Bartlett, predecessors in the title, by deed dated June 28, 1900. Exhibit D6, pages 217-220. This was a conveyance not merely of the shore (the lands lying between the high and low water marks), but by definite fixed metes and bounds described in the deed as follows:

"Beginning at a point in the high water line of the Atlantic Ocean as the same existed in May, 1900, said point being distant 325 feet southerly at right angles from the southerly line of Pacific Avenue and 175 feet easterly at right angles from the easterly line of Vermont Avenue, and from said beginning point southerly parallel with Vermont Avenue and distant 175 feet easterly at right angles from the easterly line of the same, 185 feet to a point in the easterly line of lands under water granted by the State of New Jersey to Walter B. Dick, December 28, 1899; thence southeasterly in a straight line and along the easterly line of lands as granted to Walter B. Dick 729.38 feet

to a point in the exterior line established by the Commissioners * * *; said point being distant 378 fet northeasterly along said exterior line from where it is intersected by the easterly line of Vermont Avenue extended southerly; thence northeasterly along said exterior line curving to the left on a radius of 4,000 feet, 494 feet to a point; *thence northwesterly in a straight line* 744.39 *feet to a point in the high water line of the Atlantic Ocean where the same is intersected by the westerly line of New Hampshire Avenue, said point being distant* 250 *feet southerly from the southerly line of Pacific Avenue;* thence southwesterly along said high water line to the place of beginning."

Considerable testimony was introduced for the purpose of showing that many years ago the high water line was further oceanward than at the present time, and that the ocean had worked landward until in 1869 or 1870 the high water line was at the intersection of Vermont and Pacific Avenues (see blue print map Exhibit D8), and that much of this loss had been occasioned by avulsion.

AVULSION.

Considerable space has been devoted by the respondents in their brief in the Circuit Court of Appeals to a discussion of the legal consequences of avulsion as applied to the *locus in quo*. Since both appellant and respondents claim title from a common grantor, viz: the Atlantic Beach Front Improvement Company, and both are in the position of conceding the title of that grantor to be good to the high water mark at the time of the respective conveyances to

the appellant and respondents, the question of whether the original losses resulting from erosion or avulsion is wholly immaterial, and requires no further comment or discussion in this brief.

The New Jersey statute which is the basis of the riparian grant in question is to be found in 4 N. J. Comp. Stat., p. 4832. For convenient reference the relevant portions of the statute is printed in Appendix to this Brief, p. 1A. This statute creates a riparian commission empowered to make grants of lands under water upon the terms therein prescribed, but gives a preemptive right to the riparian owner to obtain such a grant, and further provides that a grant may be made to a person other than a riparian owner after six months' notice to the riparian owner, and the neglect or refusal of the riparian owner to make application and to pay the price fixed by the Commission.

Before discussing in detail the New Jersey cases the following propositions are submitted as definitely established by adjudicated cases in the State of New Jersey:

(A) The state is the absolute owner of the land in all navigable waters within its territorial limits, and the state by its riparian grant, describing the lands granted by definite metes and bounds, conveys an absolute title to appellant's predecessor in the title.

(B) A riparian owner has no right of adjacency.

(C) The preemptive right of a riparian owner to a grant is not a vested right, but is merely granted by the legislature as a matter of grace.

(D) A riparian owner is not entitled to compen-

sation for the loss of the benefit of accretions where a grant is made to third persons.

(E) If a grant may be made to a person other than the riparian owner without compensation to the latter, then on principle the state may make a riparian grant that shall have fixed and not ambulatory boundaries.

(F) While the state had a right to make a grant of the "shore" with ambulatory boundaries, it did not do so, but prescribed by metes and bounds the fixed boundaries of its grant.

(G) *The riparian owner's right to accretions is a permissive one—a tacit license from the state—and is terminated upon the state making a riparian grant with fixed and definite boundaries. Therefore, the riparian grant to the appellant's predecessors in title is superior to the respondents' claim by accretions.*

(A) *The state is the absolute owner of the land in all navigable waters within its territorial limits, and the state by its riparian grant, describing the lands granted by definite metes and bounds, conveyed an absolute title to appellant's predecessor in the title.*

The riparian grant, Exhibit D6, page 217, omitting recitals and irrelevant matter, is in the following form:

> "Now, therefore, the said State of New Jersey, by the said riparian commissioners, the governor approving, in consideration of the

premises, the terms and conditions hereinafter contained, and the sum of nine hundred and thirty 00/100 ($930.00) dollars duly paid by the said William H. Bartlett and Elwood H. Bartlett to the said state, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell and convey, subject to the terms, covenants, conditions and limitations herein contained, unto the said William H. Bartlett and Elwood S. Bartlett, and to their heirs and assigns forever—All that parcel of land flowed by tide water lying at Atlantic City, in the County of Atlantic and State of New Jersey, described as follows:

(*The description already appears in this brief and is here omitted.*)

"With the right and privilege, under the covenants and conditions of this grant, to exclude the tide water from so much of the lands above described as lie under tide water by filling in or otherwise improving the same, and to appropriate the lands under water above described to their exclusive private uses.

* * * * * * *

"And also provided, that if the said William H. Bartlett and Elwood S. Bartlett are not the owners of the land adjoining the land under water hereby granted, then and in that event this instrument and conveyance, so far as the same binds the state, and all the covenants herein on the part of the state, shall be void as affecting any part or parts of said land which joins land not owned by the said William H. Bartlett and Elwood S. Bartlett.

* * * * * * *

"Together with all and singular the heredit-

aments and appurtenances thereunto belonging.

"To have and to hold and all singular the above granted and described lands under water and premises, subject to the terms, conditions and limitations as aforesaid, unto the said William H. Bartlett and Elwood S. Bartlett, and to their heirs and assigns forever."

This grant was executed by the State of New Jersey under the great seal of the state and signed by the governor and the members of the riparian commission.

This language is identical in substance with that contained in the grant construed by this Court in *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, 689, where the Court says:

"For the same reason it was declared in the Act of March 31, 1869, that the conveyance or lease of the Commissioners under the act should not merely pass the title to the land therein described, but the right to reclaim and fill in and otherwise improve the same, and 'to appropriate the land to exclusive private uses.' "

The language of the grant in the case *sub judice* is that the State of New Jersey "does hereby grant, bargain, sell and convey * * * unto the said William H. Bartlett and Elwood S. Bartlett and to their heirs and assigns forever, All that parcel of land, etc., * * * with the right and privilege, under the covenants and conditions of this grant, to exclude the tide water from so much of the lands above described as lie under tide water, by filling in or otherwise improving the same, and to appropriate the lands under water as above described to their exclusive private uses."

This was precisely the character of the grant in *Hoboken v. Pennsylvania Railroad.* There the Court, at page 691, says:

> "Having in view the manifest policy of this legislation and the force and meaning of its language, we do not hesitate to adopt the conclusion that the several grants of the state to the United Companies under the Act of March 31, 1869, to enable them to improve their lands under water at Kill von Kull and other places, and the grant under the general act of the same date under which the other defendants claim, or intended to secure to the grantees *the whole beneficial interest and estate in the property described to their exclusive uses for the purposes expressed and intended in the grant.* And construing these conveyances most strongly in favor of the public, and yet so as not to defeat the grants themselves, we also conclude that the rights conveyed *exclude every right of use or occupancy on the part of the public* in the land itself. The land granted is specifically described by metes and bounds. The grant is a grant of the estate in the land and not of a mere franchise or incorporeal hereditaments. The uses declared are such as require an exclusive possession by the grantees that they may hold, possess, improve and use the same for their own use and profit according to the nature of the business which by law they are authorized by law to take. *In other words, under these grants the land conveyed is held by the grantees on the same terms on which all other lands are held by private persons under absolute titles, and every previous right of the State of New Jersey therein, whether proprietary or sovereign, is transferred or extin-*

> *guished,* except such sovereign rights as the state may lawfully exercise over all other private property."
>
> *Hoboken v. Pennsylvania Railroad,* 124 U. S. 656, 691.

The above case was followed and approved by the New Jersey Supreme Court in *Elizabeth v. Central Railroad Co.,* 53 N. J. L. 491.

> "The state is the absolute owner of the land in all navigable water within its territorial limits, and such land can be granted to anyone, either public or private, without making compensation to the owner of the shore."
>
> *Stevens v. Paterson & Newark Railroad,* 34 N. J. L. 532 (E. & A.).

The respondents deny that an absolute title was vested by the riparian grant, and advance the following reasons:

(a) That the title of the state to the high water mark is a shifting one depending upon the changes in the high water mark, and that anyone who takes title from the state to land under water takes it with an ambulatory boundary. The obvious answer, however, is that the state in this case did not convey the land with an ambulatory boundary, but by specific metes and bounds. Further discussion of this subject is to be found in sub-division (e) under this caption.

(b) It is urged that on the authority of *Polhemus v. Bateman,* 60 N. J. L. 163, that until the grantees reclaim the land they acquire no exclusive right to it, except so far as might be necessary to enable them to make reclamation. The Polhemus case con-

strued the deed in that particular case, and in an action brought by the riparian grantee for trespass against a person entering and fishing upon the submerged lands included within the grant. What the language of the deed was does not appear in the opinion. The opinion, at page 167, however, makes use of the following language:

"The deed was executed in the prescribed form, but it *does not*, in terms, grant all the rights of the state in said lands to the grantee. On the contrary, it contains the provision hereinbefore recited, setting forth the purposes for which said conveyance was made. That provision was manifestly intended to give to the grantee such rights as he would have been entitled to under a grant made exclusively under the eighth section of the Act of 1869.

"That section provides that, upon delivery of the deed, 'the grantee may reclaim, improve and appropriate to his and their own use the lands conveyed.'

"The statute does not require that this provision shall be inserted in the deed; it does not enter into the form of the conveyance, but simply provides what its effect shall be when delivered. *That effect must be accorded to it unless it contains some provision narrowing its scope.*

"*So it may be admitted that the deed to Bateman, under the Act of* 1871, *in the absence of any language limiting its operation and effect, would have passed to him all the rights of the state in the lands under water,* but the deed contains the provision that he is to have the right, liberty, privilege and franchise to exclude the tide water from so much of the lands as lies under tide water by filling in or otherwise im-

proving the same, and to appropriate the lands to his exclusive private uses."

What it was in the deed that had the effect of limiting the operation and effect of the language of the statute, and which otherwise "would have passed to him all the rights of the state in the lands under water" is not apparent. Certainly the inclusion in the language of the grant of the right "to exclude the tide water from so much of the lands as lies under tide water by filling in or otherwise improving the same, and to appropriate the lands to his exclusive private uses" was not a restriction upon the grant.

From the conclusions of the Court it would appear that the language of the grant was that the grantee "may fill in or otherwise improve the same, and appropriate the lands when *so improved* to his exclusive private uses."

At any rate the employment of equivalent language in the grant in *Hoboken v. Pennsylvania Railroad* was held to be construed to vest in the grantee title on the same terms on which all other lands are held by private persons under absolute titles.

Certainly *Polhemus v. Bateman* was not intended to decide any general doctrine of riparian law, but was limited to the construction of the particular deed before the Court, and what that deed was does not clearly appear in the case. At any rate it cannot be said that if one had a right under a grant to appropriate to his exclusive private use lands when *artificially* improved or reclaimed, and that if such lands were "improved" by *natural accretion* that he had no rights whatever. It would be a palpable absurdity to say that when the result was produced by accretion, and the waters were by that means excluded, that he was required to do the futile

and impossible thing of "reclaiming" the same lands by artificial means. Can it be seriously argued that when the State of New Jersey makes such a grant it intends to say to its grantee: "We grant you these lands and give you the right to exclude the waters therefrom by *artificial* means, but if the waters are excluded by *natural* means, viz: by accretions, your title fails"?

(B) ***A riparian owner has no right to adjacency.***

Up to 1870 the courts of New Jersey had consistently recognized in riparian or littoral owners a natural right to maintain their adjacency to high water. *Bell v. Gough*, 21 N. J. L. 662, 23 N. J. L. 624. This doctrine was overruled in *Stevens v. Paterson & Newark R. R. Co.*, 34 N. J. L. p. 532 (E. & A.). The Stevens case has been followed by all of the later cases. The Stevens case holds as follows:

> "The state is the absolute owner of the land in all navigable water within its territorial limits, and such land can be granted to anyone, either public or private, without making compensation to the owner of the shore."
>
> *Stevens v. Paterson, etc., R. Co.*, p. 532.

> "It must now be accepted as the established law in New Jersey, that the right of the owner of lands bounding on a navigable river extends only to the actual high water mark, and that all below that mark belongs to the state. The inchoate right, if such it may be called, which the proprietor of the upland has, either with or without a license, to acquire an exclusive right to the property, by wharfing out or otherwise improving the same, gives him no property in the land while it remains under the water. It

may be granted by the state to a stranger at any time before it is actually reclaimed and annexed to the upland."

Stevens v. Paterson, etc., R. Co., p. 546.

"The steps which I have thus far taken have let me to this position: That all navigable waters within the territorial limits of the state, and the soil under such waters, belong in actual propriety to the public; that the riparian owner, by the common law, has no peculiar rights in this public domain as an incident of his estate, and that the privileges he possesses by the local custom or by force of the wharf act, to acquire such rights, can, before possession has been taken, be regulated or revoked at the will of the legislature."

What the Court *actually* found in *Stevens v. Paterson, etc., R. Co.* is indisputable and is succinctly set forth in the first syllabus.

"The state is the absolute owner of the land in all navigable waters within its territorial limits, and such land can be granted to anyone, either public or private, without making compensation to the owner of the shore."

(In New Jersey the syllabi are prepared by the Court.)

The essential difference between Judge White's conclusions and Justice Swayze's, are that Justice Swayze finds that if title was lost by erosion it became the property of the state, not merely as long as it remained under water, but, if the state made a riparian grant, absolutely; while Judge White, speaking for himself alone and not for the majority of the court, says:

> "I think that what the owner has *not* lost is his right, within the statutory period in this state, to toll the running of such adverse possession and defeat its ripening into absolute ownership, by regaining possession of his land * * *, by actually ejecting the ocean from his land and restoring it by artificial means to its former condition as dry or fast land, or by having it, within the like period, restored to him through the voluntary action of nature should the ocean within that time recede."
>
> *Dewey Land Co. v. Stevens,* 83 N. J. Eq., at p. 661.

This conclusion is supportable neither upon principle nor by authority, and is in absolute conflict with the majority opinion of Justice Swayze in *Dewey Land Co. v. Stevens,* and would lead to hopeless and inextricable confusion in practice. *Stevens v. Paterson, etc., R. Co.,* holds that the state is the absolute owner of the land under all navigable water within its territorial limits, and such land can be granted to anyone, either public or private, without making compensation to the owner of the shore, while under Judge White's theory the state's grantee could be dispossessed of that portion of the lands granted which at any time during the twenty years prior to the making of such grant had been fast land.

> "The result is that there is no legal obstacle to a grant by the legislature to the defendants, of that part of the property of the public which lies in front of the lands of the plaintiff, and which is below high water mark. It may be true that by such an appropriation, the plaintiff will sustain a great inconvenience than will other citizens whose lands do not run along

this river. But the injury to all is in its essence and character the same, the difference being only in degree."

Stevens v. Paterson, etc., R. Co., p. 549.

(C) *The preemptive right of a riparian owner to a grant is not a vested right, but is merely granted by the legislature as a matter of grace.*

Stevens v. Paterson, etc., R. Co., 34 N. J. L. 532, 549.

"The preemption given by the eighth section of the Riparian Act of 1860, to the riparian owner, is of grace, and not of right."

American Dock & Imp. Co. v. Trustees, 39 N. J. Eq. 409.

"The provisions for notice to the riparian owner before sale to a stranger was not the result of a necessity, but was a gratuitous concession on the party of the state which it had the power to withdraw at will. It was of grace and not of right. The provision for compensation to such owner was not a recognition of any absolute right or interest on his part as such, for it is guarded by a qualification which forbids such a conclusion. Provision is made for compensation only in case the riparian owner has any rights or interest in the land granted. If it had been intended to be a recognition of the existence of the right of such owner to or in the land granted, the provision for compensation would have been unqualified, and the recognition clear and absolute."

American Dock & Imp. Co. v. Trustees, at p. 444.

(D) ***A riparian owner is not entitled to compensation for the loss of the benefit of accretions where a grant is made to third persons.***

Stevens v. Paterson & Newark R. R. Co., 34 N. J. L. 532;

American Dock & Improvement Co. v. Trustees, 39 N. J. Eq. 409.

Stevens v. Paterson, etc., R. R. Co., has been continually cited as upholding the absolute character of the state's title. Among the cases we may cite the following:

Hoboken v. Pennsylvania Railroad, 124 U. S. 656;

Hoboken v. Hoboken Land & Imp. Co., 36 N. J. L. 540;

American Dock & Imp. Co. v. Trustees of Public Schools, 39 N. J. Eq. 409;

Marcus Sayre v. Newark, 60 N. J. Eq. 368;

Simpson v. Morehead, 65 N. J. Eq. 629;

Philadelphia Brewing Co. v. McOwen, 76 N. J. L. 636;

Sooy Oyster Co. v. Gaskill, 71 N. J. Eq. 308;

Attorney-General v. Lehigh Valley R. R. Co., 78 N. J. Eq. 349.

(E) ***If a grant may be made to a person other than the riparian owner without compensation to the latter, then on principle the state may make a riparian grant that shall have fixed and not ambulatory boundaries.***

Accepting as a correct premise the doctrine of *Stevens v. Paterson, etc., R. Co., supra*, the above conclusion is inevitable. Mr. Justice Swayze in construing the grant involved in this case in *Dewey*

Land Co. v. Stevens, 83 N. J. Eq. 314, 317 (E. & A.), says:

> "If the land was formerly fast land, and the title was lost by erosion, it became the property of the state, not merely as long as it remained under water, but, if the state made a riparian grant, absolutely. *Stevens v. Paterson and Newark Railroad Co.,* 34 N. J. Law, 532. Whatever right the former owners might have as against private persons upon the ocean receding, was of no avail against the state's riparian grant. The title lost by erosion was then lost forever, unless it was regained by accretion, and the right of accretion was the compensation of the former owner for his loss."

The last phrase of the above citation is used by Judge Haight in his opinion to completely destroy the major premise, and, in effect, to overrule the doctrine of *Stevens v. Paterson & Newark Railroad Co.*

Did Justice Swayze intend by the employment of this four-line phrase to overrule the leading case of *Stevens v. Paterson, etc., R. Co.,* and the other cases upon which he relied? Did he intend to defeat his major premise by the use of this phrase? Did he intend in this casual manner to reverse the settled law of the state upon which titles had been granted for fifty years? Such a construction is unthinkable. Is not the proper construction of this phrase as follows:

> "Whatever right the former owners might have as against private persons upon the ocean receding was of no avail against the state's riparian grant. The title lost by erosion was then lost forever, unless (*prior to the making of*

a riparian grant by the state) it was regained by accretion."

Judge Haight makes use of the opinion of Judge White in the same case as a justification for the emasculation of the Swayze opinion. Judge Haight, in his opinion, says:

> "The case of Stevens v. Paterson & Newark Railroad Co., cited by Mr. Justice Swayze, simply held that the State of New Jersey is the absolute owner of the land under all navigable waters, below the ordinary high water line within its limits, and can grant such land to anyone without making compensation to the owner of the shore, with the possible exception of the right to 'alluvium and dereliction,' pointed out in Judge White's opinion in Dewey Land Company case."

This is based upon a fundamental misconception of what was held in *Stevens v. Paterson and Newark R. R. Co.* It is true that Chief Justice Beasley in *Stevens v. Paterson, etc., R. Co.*, at p. 544, makes use of the following language cited by Judge White in his opinion, in 83 N. J. Eq., at p. 659:

> "From these authorities, and many others which might be cited, it appears to me to be plain, that by rules of the ancient law, the owner of the land along the shore was entitled to no right as an incident of such ownership, except the contingent ones before referred to of alluvion and dereliction," and, again, "if such a right (to build a wharf out beyond the high water line without a riparian grant from the state) existed by force of the common law, as an incident of property, it is obvious that it could

not be destroyed or substantially impaired by the legislature without compensation."

It is conceded that a right to accretions exists in the riparian owner, but such right ends immediately when the state, in the exercise of its paramount right, makes a grant of the lands under the water of which it is the absolute owner. If the context to the language quoted from *Stevens v. Paterson, etc., R. Co.*, be read, it is apparent that the language there employed was used in support of the theory that the rights theretofore claimed by riparian owners to extend their lands by artificial means below the line of high water or to wharf out, were based upon a mere license revocable by the state, and that *if* such privilege were revocable it existed by grace and not of right. At any rate further along in the same case, after a consideration of all the elements involved, Chief Justice Beasley reaches the following conclusion:

"The steps which I have thus far taken have led me to this position: That all navigable waters within the territorial limits of the state, and the soil under such waters, belong in actual propriety to the public; that the riparian owner, by the common law, *has no peculiar rights in this public domain as an incident* of his estate, and that the privileges he possesses by local custom or by force of the Wharf Act, to acquire such rights, can, before possession has been taken, be regulated or revoked at the will of the legislature."

Stevens v. Paterson, etc., R. Co., at p. 549.

(F) ***While the state had a right to make a grant of the "shore" (the land between high and low water marks), it did not do so but prescribed by metes and bounds the fixed boundaries of its grant.***

The respondents contend that the riparian grant was ineffective as to lands above the present high water mark formed by accretions within its original bounds. The argument advanced below was that the interior boundary was ambulatory and shifted with each change of the high water mark. This argument was based upon the case of *Scratton v. Brown*, 4 B. & C. 485, which passed upon *a grant of lands between the high and low water mark*, and not a grant of land below the high water mark described by definite metes and bounds as in this case. In the Scratton case it was held that this constituted a movable freehold, and that the Crown by a grant of the seashore would convey not that which at the time of the grant is between the high and low water marks, but that which from time to time shall be between those two termini. The grant in the case *sub judice* was by fixed metes and bounds (see p. 31 of this brief).

It will be observed that the above case is dispositive only of the question of what the grantor intended to convey by the language employed in the grant. It is not authority for the proposition that the Crown was powerless to convey lands under water by metes and bounds definitely fixed so as to exclude a riparian owner from a right to accretions, but even if it could be held to go that far the later New Jersey cases to the contrary are controlling.

(G) *The riparian owner's right to accretion, a permissive one—a tacit license from the state—is terminated upon the state making a riparian grant with fixed and definite boundaries. Therefore, the riparian grant to the appellant's predecessors in title is superior to the respondents' claim by accretions.*

Stevens v. Paterson & Newark R. R. Co., 34 N. J. L. 522;
American Dock & Improvement Co. v. Trustees, 39 N. J. Eq. 409;
Dewey Land Co. v. Stevens, 83 N. J. Eq. 314.

The true theory is that the riparian owner's right to accretion is a permissive one—a license from the state; that when the state exercises its paramount right in the making of a grant of lands under water the license is terminated. Such a theory vindicates and makes safe the title of the state's grantee. The rejection of this theory would not only unsettle the title of the state's grantee, but would deprive him of lands which belonged to the state, and for which he had paid, for the benefit of the riparian owner who was held to be entitled to no compensation whatever in case the state makes a grant of the lands under water in front of such riparian owner's lands.

III.

TITLE BY ACCRETIONS.

Is the appellants title by accretions to the locus in quo superior to the respondents' title by accretions? This involves the question as to whether the equitable method of division of a segment of a circle is by radial lines at practically right angles to the shore line or by the protraction of the upland side lines.

It must be borne in mind that both the original line of high water and the present high water line are convex in contour, and that the new high water line is more than double the length of the original line.

The first question to be settled is the time when the rights of the respective parties accrue. This has been settled in New Jersey as follows:

> "As between vendor and vendee the right to alluvion depends upon the condition of the land at the time of the transfer of the legal title."
>
> *Ocean City Assn. v. Shriver*, 64 N. J. L. 550, 551.

The title was in the common grantor, to wit: the Atlantic Beach Front Improvement Company, until November 9, 1899, when it was granted to Burkhard, Stevens' predecessor in title. (Exhibit D4, Record, p. 216).

The easterly ninety feet of plaintiff's lands were conveyed by the common grantor, the Atlantic Beach Front Improvement Company, to the States Avenue

Land Company, by deed dated May 24, 1900 (Ex. p. 17, Record, p. 203).

The question, therefore, presented is: What would have been an equitable method of division between Burkhard and the Atlantic Beach Front Improvement Company of lands formed by accretions since November 9, 1899? Would the Atlantic Beach Front Improvement Company have been entitled to all of the gains, while Burkhard would be restricted not only to his original ocean frontage, but to a shorter line? Because obviously the effect of protracting Burkhard's side lines would be to effect such a reduction, since his original shore line ran at an oblique angle.

In order to sustain the decree in this case it must be held against all authority that under such circumstance one co-terminus owner is entitled to all of the gain caused by the longer shore line, and the other to no part of such gain. Is there any way of equitably dividing a segment of a circle except by radial lines? The attempt to do otherwise, it seems to us, is equivalent to an attempt to square a circle.

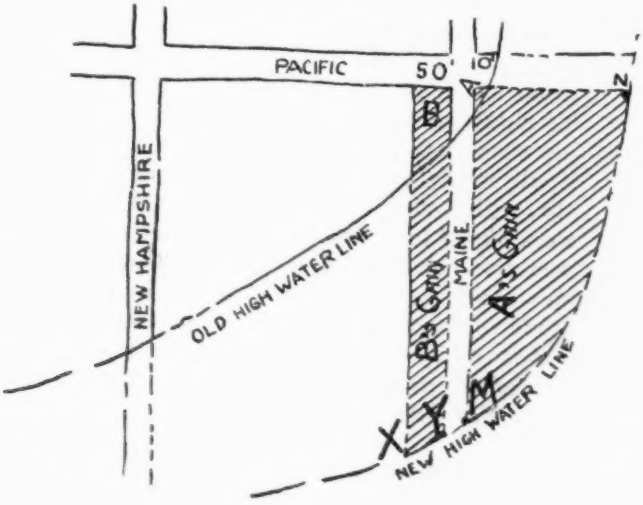
The difficulty with the opinion of Judge Haight is that he does not apply his method to the whole area of accretions, nor does he apply it to the rights of the parties as they accrued at the time of the conveyance from the common grantor, to wit, November 9, 1899. He conveniently moves his trouble further up the beach and leaves it there. He says:

> "Whether the riparian proprietors who owned lands east of the plaintiff's lands should have the accretions divided among them on lines parallel with New Hampshire Avenue, or on lines parallel with Pacific and Oriental Avenues, it is not necessary to decide."

But there is a necessity to decide whether the

method adopted by Judge Haight when applied to the whole accreted territory would result in an equitable division. If it would not so result it is manifestly wrong.

The real question in controversy is: How should the longer high water mark be divided between Burkhard and the Atlantic Beach Front Improvement Company? The method suggested by Judge Haight ignores this factor and ignores a large part of the accreted territory lying to the east, and his method, if carried to its ultimate conclusion, would result in the owner holding the extreme easterly portion of the shore taking all of the gain by accretion within the boundaries of Pacific Avenue and Maine Avenue extended. Even though he owned but ten feet of ground he would become the owner between lines diverging at an angle of ninety degrees of a great tract of accreted land. This point may be illustrated by the following rough sketch:



The tract marked A is the result obtained by adopting the side line extension scheme. B, the adjoining lot owner, acquires a smaller water frontage on the new high water line (X-Y) than he had on the old; while A, owning only ten feet of land, acquires the extensive frontage indicated (M-N). This is the result of side line extension—a mere legal lottery.

General Principles of Accretions.

Concerning the general principles of division Professor Farnham has the following to say:

> "In *Deerfield v. Arms*, 17 Pick. 41, the Court says two objects are to be kept in view in the division of a water front; one is that the parties shall have an equal share in proportion to their lands of the area of newly formed land, regarding it as land useful to the purpose of cultivation or otherwise in which the value will be in proportion to the quantity; the other is to secure to each an access to the water and an equal share of the river line in proportion to his share on the original line of water, regarding such water line in many situations as principally useful for forming landing places, docks, etc., with a view to benefits of navigation. *The main object to be kept in view in any division of accretions or the bed of water is that the division shall be equitable, and that it shall be proportionable so far as to give each shore owner a share of the land to be divided and his due portion of the exterior water line.*"
>
> 3 *Farnham on Waters*, p. 2474.

> "The title by accretions or right of accession in relation to land is a sort of legislative dona-

tion of what would without such donation be public property * * *. This legal title refers, it is true, to one of the lines of the riparian proprietor's original title as a measure of his right of accession in the alluvial accretions of soil. But the line so referred to is not the side lines of the original conveyance or grant. It is its front line, and the front line alone. The course of sides lines is of no consequence in the division of alluvion formed subsequently to the conveyance or grant. The line of such division must be drawn in such a manner as that each of the contiguous riparian proprietors *shall have such a proportion of alluvial soil as to the total extent of his front line bears to the total quantity of the alluvial soil to be divided.*"

Delord v. New Orleans, 11 La. Ann. 699. (The italics are our own.)

The principle universally recognized by Courts that are called upon to establish rules for division of riparian lands, is that the upland owners are entitled to take new front in proportion to their ownership of the old frontage. In those cases where right angles were drawn to determine a division it will be found that the shore was straight, and that a proportionate division of the new shore line was thereby effected. Where the shore does not form a straight line, but is convex or concave, and the protraction of the side lines being impracticable, the new water front is divided proportionately.

Wonson v. Wonson, 14 Allen, 71;
Batchelder v. Keniston, 51 N. H. 496;
Kehr v. Snyder, 114 Ill. 313;
Deerfield v. Arms, 17 Pick. 45;
Johnston v. Jones, 66 U. S. 1;

O'Donnell v. Kelsey, 10 N. Y. 412;
Nauman v. Burch, 91 Ill. App. 48;
Berry v. Hoogendoorn, 133 Iowa, 437, 108 N. W. 923;
Newell v. Leathers, 50 La. Ann. 162, 23 So. 243;
Hathaway v. Milwaukee, 132 Wis. 249, 9 L. R. A. (N. S.) 778; 111 N. W. 570, 112 N. W. 455;
Groner v. Foster, 94 Va. 650, 27 S. E. 493;
Stock v. Neriwhether, 57 Pac. 438 (Kan. S. C. 1916);
Reed v. Moore, 151 S. W. 1005 (S. C. Ark. 1912);
Malone v. Moves, 145 S. W. 193 (S. C. Ark. 1912).

With regard to lakes, the same principle controls. *Calkines v. Hart* (N. Y. Ct. of App. 1916), 113 N. E. 785; *L. R. A.* 1917 B. 783, and the cases set forth in the foot note to the L. R. A. reference noted above.

The cases on the subject have been collected and are set forth in two comprehensive editorial notes found in 21 *L. R. A.* 776, and 25 *L. R. A.* (N. S.) 257.

Judge White, in his opinion in *Dewey Land Co. v. Stevens,* adopts the apportionment made by the riparian commission, which covers the entire frontage of lands formerly owned by the common grantor, as equitable. Indeed, it requires but a single glance at the map (Exhibit D8) to satisfy one of the correctness of this view. It is inevitable from the contour of the shore line that the line of the riparian grants and the lines of accretions should be coincident. Judge White says in his opinion:

> "Of course, changes are constantly taking place in the high water lines and in the direction

thereof. A shore which one year was concave in its contour may a year later have become convex. The resultant effect upon lines projected at right angles to it at various points during the process of transition to determine boundaries between neighboring accretion gains, is hopelessly confusing and the consequent state of uncertainty in titles most injurious. A practical working system is necessary for the good of all, *and where such a system has been established its fairness must be more than questioned, in fact, must be clearly overthrown, before the courts will feel justified in intervening. Such a working system seems to have been adopted by the riparian commission under its appointment by, and within the discretion vested in it by the sovereign power of the state.* Under this working system it takes the line of general contour of the shore in the vicinity, and, disregarding local or trivial or temporary indentations or excrescences, runs its division lines at right angles, or as nearly at right angles as is equitable under the circumstances, to such general line of contour at the time it takes up the subject of making riparian grants in such vicinity, and then, subsequently adheres as nearly as possible, or as is equitable, to the general division lines thus established, without regard to the fact that subsequent shifting of angles and locations of the high water line may have brought about a condition which, if it had existed originally, would have produced different results in the directions of such division lines. *Not only do I fail to see any unfairness in this working system, but, on the contrary, I cannot see how any other could be practical.*

> Where, therefore, as here, the riparian commission has made a grant, the bounding division or side lines of which run at right angles, if that is equitable, or if not, at such angle as, under the circumstances, is equitable, to the general contour of the shore at the time of the plotting or surveying of the vicinity for riparian granting, such lines will, I think, be upheld by the courts as a *practical and legal ascertainment* of the boundary lines of subsequent accretion gains to the adjacent high land should such gains occur. *Gould Wat. Secs.* 162, 163. This is so, I take it, not because the state, through the riparian grant, has vested in its grantee a title to land under water which survives when the land by accretions to the adjacent high land has ceased to be under water, but because the riparian grant, as here made, is by its very authority confined to the land under water in front of the grantees adjacent high land, viz., to the land which would become his by accretion to such high land should natural accretions occur, and, consequently, the division boundary lines defined in the grant are an authoritative ascertainment by the granting tribunal of the boundary lines of these accretion gains should they occur. Gould Wat. Sec. 162."
>
> *Dewey Land Co. v. Stevens*, 83 N. J. Eq. 656.

Plaintiff in the argument below cited a number of Massachusetts cases in support of his contention that where the owner had previously laid out property with reference to the lines of a street it was a sufficient reason for extending the lines of the lots on either side of the street parallel thereto, and

most of these cases are cited by Judge Haight in his opinion. Among them are the following:

Valentine v. Piper, 22 Pick. 88;
Piper v. Richardson, 9 Metc. 155;
Drake v. Curtis, 9 Cush. 446;
Commonwealth v. City of Roxbury, 9 Grey, 523;
Gerish v. Gary, 120 Mass. 132;
Adams v. Wharf Co., 76 Mass. 521;
Attorney-General v. Boston Wharf Co., 78 Mass. 553.

Counsel for the plaintiff have misconceived the force and effect of the Massachusetts decisions which they cite. These cases *do not* hold that the side lines of upland lots and of streets will be extended to the extreme line of riparian ownership. On the contrary they uphold the negative of this proposition. They do hold that where co-terminus shore owners agree on the division of their subaqueous lands the Courts will uphold their agreement, and further that where these lands have been built on and the artificial boundaries acquiesced in for long periods of time, an agreement of division will be implied therefrom. Beyond this they do not go.

By an ordinance passed in 1641, littoral proprietors were entitled to hold to the low water mark. The foreshore, known in Massachusetts as flats, has ever since been regarded as vested in the upland owners, although flooded by the tides. The problem of drawing the division lines between owners of these flats would have been conveniently settled by protracting the sides lines of upland ownership. But the courts early refused to apply this rule of convenience, declaring it inequitable, and substituted the rule of division by right angles where the

shore was straight, and proportionate division on the line of low water where the shore was curved.

Thus it was held in *Rust v. Boston Mills Corp.*, 6 Pick. 169, that the direction of the side lines of the upland would not govern that of the side lines of the flats, but that the *locus in quo* being situate on a cove, the division must be proportionate. This view was affirmed and followed in *Piper v. Richardson*, 9 Met. 155, 158,—the Court declaring "the side lines of the upland have no influence in deciding the direction of the exterior side lines of the flats," in *Drake v. Curtis*, 9 Cush. 446; *Curtis v. Francis*, 9 Cush. 447; *Stone v. Boston Steel & Iron Co.*, 14 Allen, 130, and many others.

The intention of the ordinance was, "if practicable, to give to every proprietor the flats in front of his upland of equal width with his lot at low water mark." Wilde, J., in *Gray v. Deluce*, 5 Cush. 12. Therefore, where there was no cove or headland, a straight line is to be drawn according to the general course of the shore at high water and the side lines of the lots extended at right angles with the shore line. *Sparhawk v. Bullard*, 1 Metc. 106; *Porter v. Sullivan*, 7 Gray, 443; *Deerfield v. Allen*, 17 Pick. 45, 46; *Knight v. Wilder*, 2 Cush. 210.

Around the headline, it was held, lines dividing the flats must diverge towards low water mark. *Gray v. Deluce*, 5 Cush. 12, 13; *Porter v. Sullivan, supra.*

The plaintiff has placed considerable emphasis on *Valentine v. Piper*, 22 Pick. 85. An examination of that case shows that the dispute was not over flats but over uplands, the Court holding that proof of the ownership of the upland carried with it a presumption of ownership of the flats. Regarding the side lines of the flats, the Court held that where those lines had been established by awards or fixed by

agreement of the parties, these boundaries would be recognized by the Court. In this case the northerly side line had become established by the erection of a wharf extending into the water. To this wharf Summer Street had later been run. The wharf had finally fallen to pieces, but its location remained fixed by the line of the street. The Court held that the southerly line of the flats should conform to the established boundary on the north, referring to the street. Counsel have deduced therefrom that the Court regarded Summer Street as in itself determining the boundary. This was not the case, the line of Summer Street being used to fix the riparian division lines solely because it marked the line to the old wharf, which extending to low water mark had served to mark the division of ownership of the flats.

Judge Haight does not attempt to enunciate any rule for the equitable division of the accreted territory, but bases his decision upon a presumed agreement of the parties or their predecessors in the title, and makes this the decisive factor.

IV.

Whether by reason of certain conveyances of upland having been made with reference to New Hampshire Avenue, thereby that avenue was constituted a fixed boundary and impassable barrier separating as between co-terminous owners of the upland the accreted lands thereafter formed.

In support of such presumed agreement Judge Haight cites the following:

A. New Hampshire Avenue is delineated on the "1854" map as extending in a straight line and at right angles to Pacific Avenue to the low water mark of the Atlantic Ocean, further than it extends at the present time.

B. Numerous conveyances have been made and mortgages executed upon the properties where the properties have been described by lines running at right angles to and parallel with the street system.

From A and B he finds that "It is manifest that if it should be held that the respective riparian proprietors are entitled to accretions in accordance * * * with the lines of their riparian grants * * * a very great confusion in titles would result and the door be thrown open, in the straightening out of lines, to the making of exorbitant demands, etc."

Before considering the reasoning of Judge Haight particular attention should be called to the following facts: That as to all lands lying eastward of New Hampshire Avenue and owned by the plaintiff's predecessor in the title, except for a strip of 90 feet east of and parallel with New Hampshire Avenue, riparian grants along radial lines were made by the State of New Jersey, the first of which was dated December 29, 1900, and made to John McPherson, and two of which were made on October 21, 1901, to Charles G. Henderson, et als. (See Map Exhibit D8.)

It will be recalled that the title of the plaintiff as to a strip 100 feet in width and beginning 90 feet east of New Hampshire Avenue came from the Atlantic Beach Front Improvement Company, who conveyed to Henderson, Moss and Hancock by deed dated November 1, 1899 (Ex. P16, Record, p. 202).

Henderson, et als., conveyed to Conrow by deed dated April 14, 1903 (Ex. P18, Record, p. 203). Conrow conveyed to the States Avenue Land Company by deed dated April 14, 1903 (Ex. P19, Record, p. 204). States Avenue Land Company conveyed to Dewey Land Co. by deed dated December 19, 1904 (Ex. P20, Record, p. 205). It will, therefore, be seen that the plaintiff's predecessors in the title, to wit, Henderson and others, not only acquiesced in the method of radial lines of the riparian grants, but actually received conveyances thereof from the State of New Jersey prior to conveying their title to the plaintiff.

Not only did the plaintiff's predecessors in the title recognize and accept radial boundary lines for the riparian grants, but the plaintiff himself specifically recognized the principle of radial lines as applied to accretions by the following formal deeds:

Deed, Dewey Land Company to Louis E. Stern, dated July 17, 1912 (Ex. P26, Record, p. 209), the description of which reads as follows:

> "Beginning at the intersection of the south line of Dewey Place with the east line of New Hampshire Avenue, and extending thence east along the south line of Dewey Place 190 feet; thence southward parallel with New Hampshire Avenue 350 feet, more or less, to high water line of Atlantic Ocean as it existed on April 14, 1903; *thence east at right angles to high water line of the Atlantic Ocean as it existed in* 1856, 770 *feet, more or less, to said high water line as it then existed;* thence southwest along the high water line of the Atlantic Ocean as it existed in 1856 to point in said high water line where the same would be intersected by the east line of New Hampshire Avenue extended;

thence north in the east line of New Hampshire Avenue, extended, 1120 feet, more or less, to beginning" (Appeal Record, p. 67).

Louis E. Stern conveyed to Dewey Land Co. by deed dated July 17, 1912 (Ex. P26, Record, p. 211), the property last above referred to by a description identical with that contained in the deed from the Dewey Land Company to himself, and the Dewey Land Co. conveyed to Nirdlinger by deed dated Feb. 4, 1914 (Ex. P28, Record, p. 210) by a description identical with that contained in the last mentioned deed.

Nirdlinger claims title to the locus in quo by deeds dividing the accreted territory by radial lines.

It is at once apparant that the deed from Stern to Nirdlinger, last above referred to, included lands formed by accretion between 1903 and the date of the deed (see Exhibit D8), and that thereby there was a clear recognition by Nirdlinger of the principle of dividing the accreted territory by lines formed at right angles to the shore line. It is true that he adopted the shore line of 1856 as the base of his right angle. While this line cannot be accurately defined at the present time, every known high water line, as well as the low water line of 1852, was convex in contour.

We then have the plaintiff himself by a formal deed made directly to himself recognizing the principle of radial lines of division as to a part of the *locus in quo*. We also have his predecessors in the title, namely, Henderson, Moss and Hancock, accepting riparian grants with radial lines of division, from the State of New Jersey affecting another part of the *locus in quo*.

With whom was the presumed agreement made?

Down to 1899 the lands on both sides of New Hampshire Avenue were in common ownership so far as the beach front was concerned. There was no one with whom any agreement could have been made. It was impossible for the holder of the common title to "agree" with himself.

Cases cited both in the opinion of Judge Haight and in the brief of counsel refer to agreements between *co-terminus owners,* and relate to lands *below the high water mark.*

Obviously the adoption of the boundary line above the high water mark would be no evidence of an agreement as to the division of lands below the high water mark, or of accretions should they occur. There was clearly, therefore, no agreement prior to 1899 as to the division of accretions, *because there was no one with whom such an agreement could be made.*

The record in this case discloses every conveyance made to the high water mark and covering all of the lands acquired by John McClees. *As none of the several hundred grantees who accepted deeds running at right angles to or parallel with the street system were riparian owners it makes no difference whatever to their titles how the shore line originally ran,* or how the division lines of accretions formed subsequently to their acquisition of title shall go. McClees could convey lands which he owned *inside* of the high water mark by any angles that he saw fit. It was his land until 1899 and extended to the high water line wherever it might be. The only conveyances made subsequent to that time are accounted for in this proceeding.

How it is "manifest * * * that a very great confusion in titles would result" to several hundred other grantees is not apparent. Their title papers were not before the Court; no one of these parties was before the Court, and it does not appear by any proof that their titles would be in any way adversely affected. As the land was in a common grantor until 1899, and their conveyances must have been made prior to that time, they received their titles from the only man who had any claim thereto, viz., John McClees, regardless of how future accretions should be divided. Accretions had formed when they took their deeds, and there could be no adverse claimant because of the fact that McClees owned all of the land to the high water mark.

By way of illustration let us assume that McClees continued to own all of the lands appearing upon Exhibit D8 up to the high water mark of 1907, and that he conveyed them to sundry grantees, reserving to himself a belt of 15 feet extending from the high water mark landward. There would be nothing whatever to prevent his making conveyances landward of the fifteen foot strip at right angles to or parallel with the street system, nor would the rights of such grantees be in any way affected if subsequently to 1907 accretions formed out to and corresponding with the riparian commissioners' exterior line as shown upon Exhibit D8. Obviously all of such newly accreted lands would belong to McClees, and obviously all of the lands theretofore granted by him parallel with or at right angles to the street system would be the property of his grantees, and no confusion to the title of his grantees would result from the last formed accretions.

It seems passing strange that if the confusion in their titles (not before the Court) was so "manifest"

that it would not have been apparent to Judge White who, as is well known, lives at Atlantic City, and who endorsed the plotting of the vicinity for riparian grants as a practical and legal ascertainment of the boundary lines of subsequent accretion gains to the adjacent high lands, should such gains occur. It is scarcely conceivable that Judge White, a resident of Atlantic City, and the owner of valuable property interests along the beach front, should have been so insensible to the danger as to promulgate a rule, the effect of which would be to throw into confusion hundreds of titles almost at his very door.

ON THE RIGHT TO CROSS THE LINE OF NEW HAMPSHIRE AVENUE:

It must be remembered that in New Jersey abutting property owners own the fee to the center of the street. *Ocean City v. Shriver,* 64 N. J. L. 554; *Salter v. Jonas,* 39 N. J. L. 469. This fee is subject to the easement of the public, but the fee is in the abutting owners.

It was absolutely essential that the line of accretions for lands formerly owned by McClees should cross the streets as laid out in the Atlantic City street system. At one time the high water mark was practically at the corner of Vermont and Pacific Avenues (see Judge Haight's opinion, p. 331, lines 30-34). Since that time lands have formed at least 1000 feet south of Pacific Avenue, at least 800 feet east of Vermont, which made necessary the crossing of the following avenues: Pacific, Vermont, New Hampshire, and Maine Avenues.

Upon what principle of either law or logic can it be said that the owner of the lands at the high water

mark at the time when it intersected Vermont and Pacific Avenues would be barred from accretions crossing the street system? To whom would such accretions belong? If to the owner of the shore line then it would be absolutely necessary that his rights should extend across the street system. How would the public be injured? The public easement in the street would continue regardless of the abutting property owner's ownership of the fee. Since the public would not be injured, and since there could be no rival claimants where the shore line was in common ownership, to deny the riparian owner the right of crossing the street system would be a palpable absurdity. If the streets were originally dedicated to the high water mark the dedication would continue, and would carry the dedicated street to the new high water mark formed by accretions.

Judge Haight relied upon the case of *Stockton v. Browning*, 18 N. J. Eq. 309, which he considered so nearly analogous as to make the case an important authority. *Stockton v. Browning* was a case where an old division line between lands lying on tidewater had for more than forty years been treated by the owners as extending over the shore or the lands between high and low water, and regarded the same as the division line of their right upon the shore. In that case it was held that the recognition of this line *below* the high water line fixed the rights of the parties. It is not authority, however, for the proposition that the recognition of the line above the high water mark, to wit, New Hampshire Avenue (in this case) fixes the line for the division of accretions.

In the *Browning* case the division line was created by deed of 1695. By conveyance made in 1769 the division line was fixed and was recited to extend to

low water mark. A similar deed in 1843 conveyed the lands to *low water mark.* It was originally supposed in New Jersey that the title of the riparian owner extended to low water mark. As there had been this recognition of a line of division for a long period the Court held that the parties were bound by the recognized line when accretions occurred.

In the Browning case, however, there were two elements not present in the case *sub judice*: (1) That the agreement as to the division line related to lands below the high water mark. (2) There were adjoining owners (so that an agreement could be made). In the case *sub judice* New Hampshire Avenue is above the high water line and the easement of New Hampshire Avenue was not intended as a line of division between separate owners but the lands on both sides of the street were in common ownership. Will the Court upon such a slender foundation assume and create an agreement that the mere laying out of this public street through lands in common ownership at the time was acquiesced in by the common owner as the means of unnecessarily depriving him of his right of accretions when they should occur? Can it go further than to say that the laying out of the public streets was an acquiescence by the owner of the common title in the public easement or use of such street? Certainly the public rights demanded nothing more than this, and to exact more of the owner would be to deprive him of his natural rights without benefit to any one else in such a situation. *If such owner was not entitled to the accretions there was no one else in existence who could lawfully claim the same.*

A number of cases have been cited by the plaintiff in support of the proposition that the defendant has no right to cross the line of New Hampshire

Avenue. Among them is the case of *Banks v. Ogden,* 2 Wall. 57. An examination of these cases discloses the fact that the streets referred to were streets intervening and bordering the high water mark, and not streets running at right angles thereto, as does New Hampshire Avenue. When properly considered they simply hold the well-known doctrine that if there be any intervening lands between that of the claimant and the high water mark, the claimant can take nothing because he is not a riparian owner. Extended comment or discussion is unnecessary.

Appellant's reasons for the reversal of the decree of the District Court may be summarized as follows:

(a) Because this matter is *res adjudicata* by the New Jersey suit. The reasons in support of the above are summarized at pages 7 and 8 of this brief under the title of "*Res Judicata.*"

(b) The appellant's riparian grant conveys an absolute title. In support thereof, See *Dewey Land Co. v. Stevens,* 83 N. J. Eq. 314 and 656; *Stevens v. The Paterson Railroad,* 34 N. J. L. 532, and other cases cited under the caption of "On the Effect of the Riparian Grant" (pages 31 and 32).

(c) The appellant is entitled to the *locus in quo* by reason of accretions. In support thereof the following propositions are advanced:

1. The basis of division is the respective rights of Burkhard (appellant's predecessor in title) as of November, 1899, and the Atlantic Beach Front Improvement Company.

2. The method of division should be such that the contiguous riparian proprietors, viz., Burkhard and the Atlantic Beach Front Improvement Company, shall have such a proportion of the alluvial soil as the total extent of their respective front lines bear to the total quantity of the alluvial soil to be divided, and such line of division is referable not to the side lines of the original conveyance but to the front line alone.

3. Because the mere protraction of the side lines would result in an inequitable apportionment, in that all of the gain in the shore line would go to the most easterly proprietor instead of being equitably divided.

4. Because the assumed agreement that New Hampshire Avenue should constitute a boundary line between co-terminus owners has no basis in fact, the lands on both sides of the street being in common ownership up to the time of the conveyance to Burkhard, and there being no co-terminus owners between whom an agreement could be made.

5. Because all of the lands east of *Vermont* Avenue south of Pacific Avenue have been formed by accretions and have crossed several streets, and an attempt to limit the riparian owner so that he could not cross the line of any public street would be to exclude from ownership by accretion all lands lying south of Pacific Avenue and east of Vermont Avenue, and such a ruling would unquestionably unsettle hundreds of titles.

6. Because plaintiff and plaintiff's predecessors in the title acquiesced in the division of a part of

the *locus in quo* along radial lines, both as to riparian grants and accretions. See riparian grant, State of New Jersey to John McPherson, and State of New Jersey to Charles G. Hendereson (Map, Exhibit D8) and deed, Dewey Land Co. to Stern (Exhibit P24; Appeal Rec. p. 67) and Stern to Nirdlinger (Exhibit P26; Appeal Rec. p. 68).

In conclusion, it is respectfully submitted that the decree should be reversed for the reasons stated in this brief.

HARVEY F. CARR,
Attorney for and of Counsel with Petitioner.